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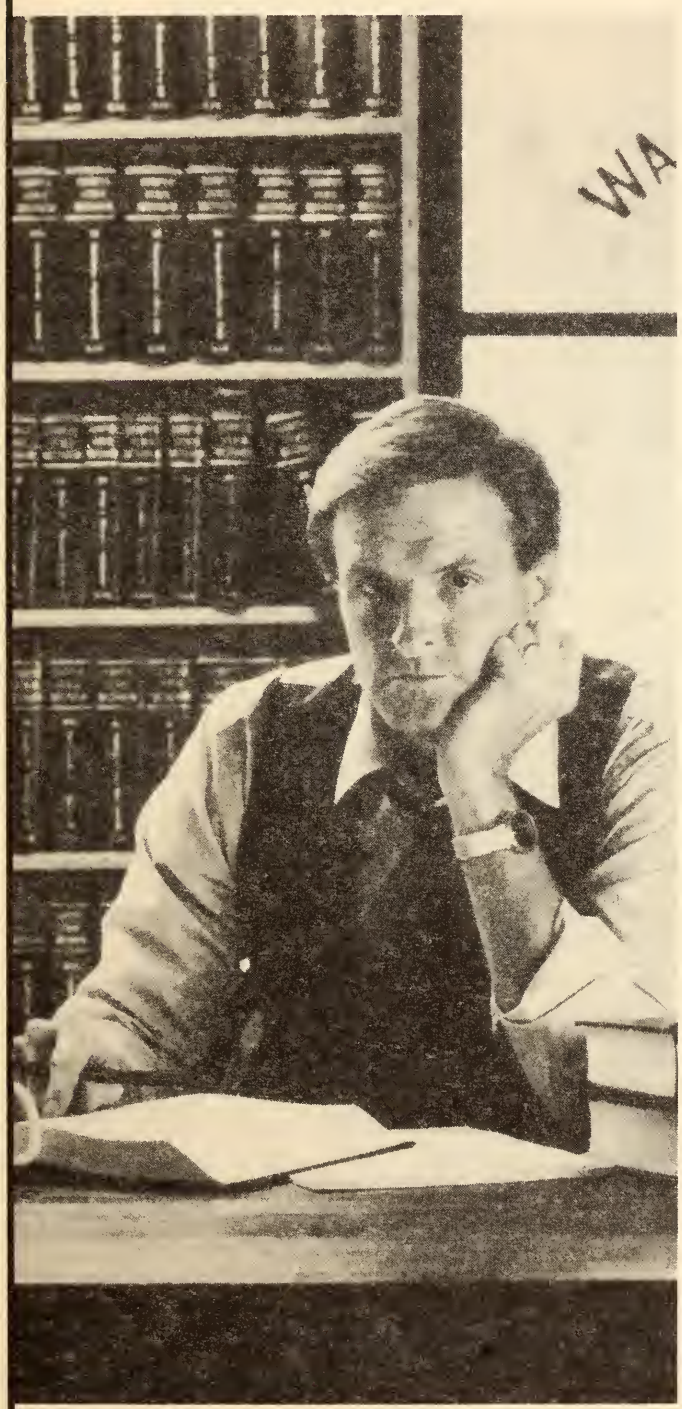

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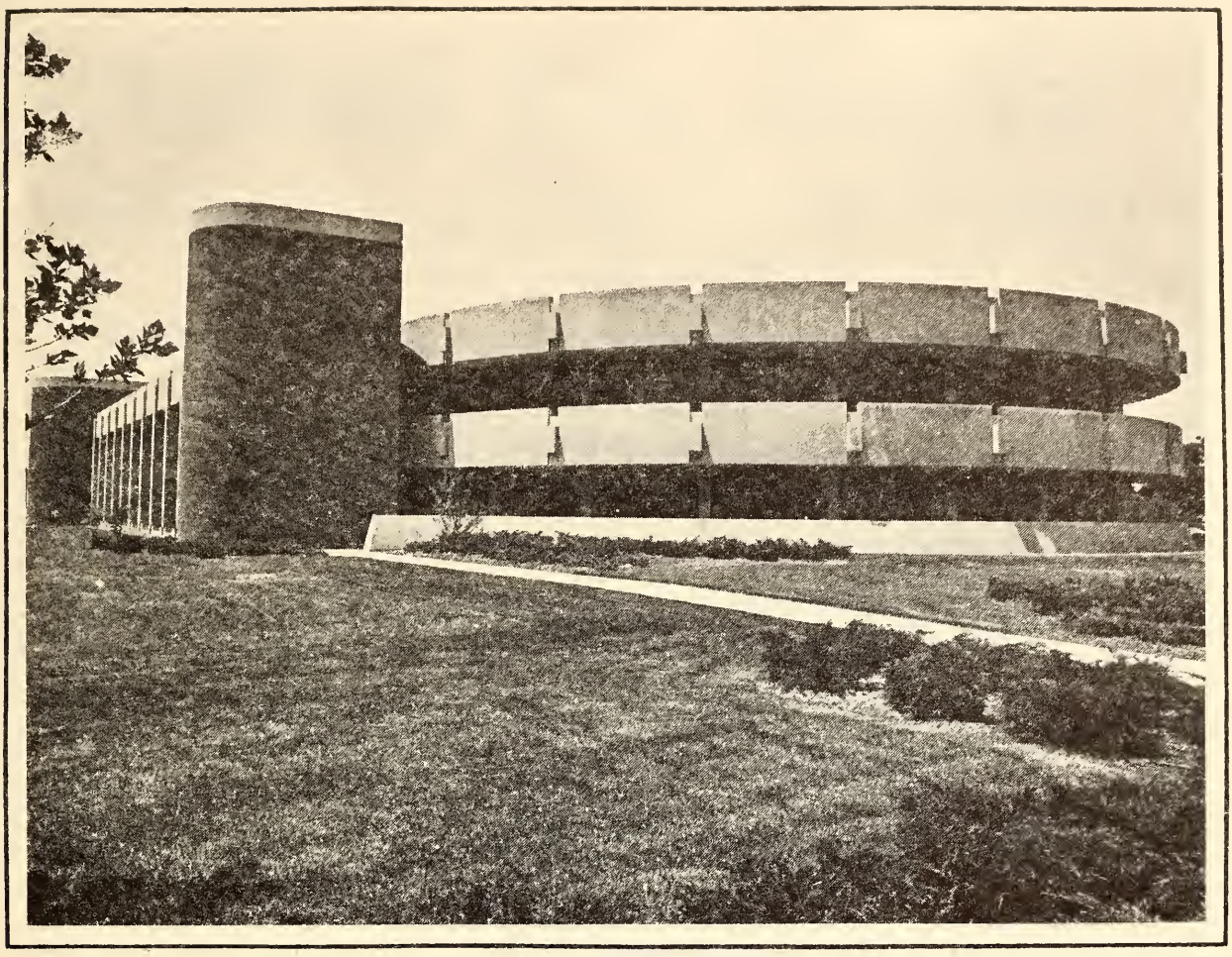

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Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges*

Ruggero J. Aldisert**

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**Chief Judge, United States Court of Appeals for the Third Circuit. Author, The Judicial Process (1976). University of Pittsburgh, A.B., 1941; J.D., 1947. The writer expresses appreciation for valuable editing assistance by R. Scott Henderson.

I. Introduction to Philosophical and Jurisprudential Concepts

After twenty-five years as a judge, I find myself somewhat uncomfortable because I am unable to pigeonhole myself into the fashionable categories used by political scientists, respected law professors, lawyers, and both the print and broadcast media to describe judges. I feel somewhat inadequate because I simply don't know if I am a "liberal," "conservative," "activist," "strict constructionist," "centrist," "moderate," or "Reagan type." Although these expressions are so commonplace that obviously many must have an idea what they mean, I'm not quite sure that these expressions are likely candidates for definitional prizes in explaining what they mean. These descriptions probably originated in the political arena as handy one-word pejoratives, but they surely have caught on and are very much with us today.

I have been a judge-watcher for a long time, and my view has been an unusual one, because it has been from the inside looking both out and up; looking out at fellow appellate judges and looking up to the Supreme Court justices who review our work. I do this watching because my avocation, if you call it that, is studying the judicial process. By this I mean a study of methods—of how courts decide cases; an analysis of decisionmaking as it actually takes place and as it ought to take place. As a long time student who believes he still has a long way to go, I put aside, for our immediate purposes, the substantive law that is the product or result of the process. In these pages, I will content myself only with examining the process itself.

The more I think about the judicial process and one-word labels bandied about to describe those who make the process work, the more I'm convinced that this splash and dash is a very ineffective attempt to cover a very complex individual—today's federal judge. As two digits may not adequately describe a nuclear physics formula, simplistic expressions cannot begin to cover very complicated judicial personalities. I think that this is true when describing any judge, but it's even more so when you describe federal judges, especially federal judges on the appellate hierarchy's two top tiers.

A. Theories of "Liberal" and "Conservative"

If you are comfortable with the most familiar dichotomy—the division between so-called liberal and conservative judges—you have your choice of a number of abstract theories. If you so choose, you can start with the clash between two renowned works of moral and political

philosophy, John Rawls' *A Theory of Justice*[1] and Robert Nozick's *Anarchy, State, and Utopia*.[2] Rawls expressed his conception of justice in the statement: "All social values—liberty and opportunity, income and wealth, and the bases of self respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[3] Nozick defended a thesis of the "minimum state," and argued that state intervention is severely limited to the narrow function of protection against force, theft, and fraud, and to the enforcement of contracts. He contended: "The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. Yet many persons have put forth reasons purporting to justify a more extensive state."[4] Perhaps we can say that liberal or activist judges will do what they can to enforce the egalitarian philosophy of Rawls, and that the conservatives will lay back with Nozick, content that the least government is the best government.

Or you can select another method of separating the liberal sheep from the conservative goats by hearkening to the differences between Locke and Hobbes in reconstructions of the state of nature. John Locke's *Second Treatise on Civil Government*[5] emphasized the natural rights of individuals as to "life, liberty and estate."[6] He built on English tradition as illustrated by Sir John Fortesque and Coke, the entire emphasis of which had always been on rights of the individual rather than the rights of people considered en masse. Locke believed that the state of nature was an era of "peace, good will, mutual assistance, and preservation" in which the "free, sovereign" individual is already in possession of all valuable rights. Yet from defect of "executive power" the individual is not always able to make his rights good or to determine them accurately with respect to the like rights of his fellows.[7] Hobbes painted a far different picture of man's state before any government existed. He visualized it as one of "force and fraud," in which "every man is to every man a wolf."[8] From this we may draw the conclusion that Hobbes traced all rights to government and regarded them simply as implements of public policy. Locke, on the other hand, regarded government as creating no rights, as being strictly fiduciary in character, and as designed to make secure and more readily available rights that antedate government and that would survive it. I think traces of labels of conservative and liberal peek through here.

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[1] J. Rawls, A Theory of Justice (1971).
[2] R. Nozick, Anarchy, State, and Utopia (1974).
[3] J. Rawls, *supra* note 1, at 62.
[4] R. Nozick, *supra* note 2, at 149.
[5] J. Locke, Second Treastise on Civil Government (Everyman's ed. 1924).
[6] *Id.* at 158-59.
[7] *Id.* at 164-65.
[8] T. Hobbes, Leviathan c. 13 (1651).

Yet another choice is available—the dichotomy suggested by Alexander M. Bickel in *The Morality of Consent*.[9] He stated that the liberal and conservative traditions have competed, and still compete, for control of the democratic process and of our constitutional system, and that both have controlled the direction of our judicial policy at one time or another.[10] Bickel, too, referred to John Locke in the context of the social contract theory. He described this tradition as contractarian,[11] a tradition that rests on the vision of individual rights that have a clearly defined, independent existence predating society and that are derived from nature and from a natural, if imagined, contract. Society must bend to these rights.

Bickel named the other tradition the Whig tradition, one intimately associated with Edmund Burke.[12] This model rests not on anything that existed prior to society but on flexible, slow-moving, highly political circumstances that emerge as values of society evolve. The task of government, according to this tradition, is to make a peaceable, good, and improving society informed by the current state of values.[13] In discussing Burke, Bickel stated:

> [The rights of man] do not preexist and condition civil society. They are in their totality the right to decent, wise, just, responsive, stable government in the circumstances of a given time and place. Under such a government, a partnership Burke calls it, "the restraints on men, as well as their liberties, are to be reckoned among their rights," and "all men have equal rights, but not to equal things," since a leveling egalitarianism, which does not reward merit and ability is harmful to all and is unjust as well.[14]

Because all these thoughtful analyses are couched in the abstract, I think that to predict how a judge will decide a case based on a preconceived label is at best a shaky, if not a downright imperfect, diversion. Yet the effort continues unabated, with the main journalistic effort taking the form of a track record tally. It is a quantitative analysis that proceeds by inductive reasoning from decisions made in specific cases that are then generalized into a conclusion. A judge is labeled a liberal, more or less, if he is inclined to favor claims in the following categories: criminal defendants or prisoners (excluding those accused of white collar crimes such as income tax evasion, fraud, embezzlement, or antitrust violations); civil rights claims of women, blacks, Hispanics, and aliens; labor unions and employees in labor-management cases;

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[9]A. Bickel, The Morality of Consent (1975).
[10]*Id.* at 3.
[11]*Id.*
[12]*Id.*
[13]*Id.* at 4.
[14]*Id.* at 20.

employees in Title VII employment discrimination claims; the insureds as against insurance companies; small businesses against big businesses; tenants in landlord-tenant cases; debtors or bankrupts; buyers of goods rather than sellers; stockholders in stockholder suits; civil antitrust plaintiffs; workers in compensation cases; Social Security disability claimants; the injured or the decedents' estates in automobile cases; patients or clients in professional malpractice cases; the injured in products liability or federal tort claims; section 1983 plaintiffs against local, county, or state government officials; and individuals or citizens' groups against government agencies, but in favor of the government agency in regulation of business cases. The judge is considered a conservative if he is inclined the other way.

I think danger exists in calling the shot either by trying to characterize the judge as an apostle of some philosopher or by running a tab on who won what case on which the judge sat. I think it is far more productive to consider at least three basic concepts that go into the judicial process: legal philosophy, jurisprudence, and jurisprudential temperament. A full discussion of these elements is necessary if we are to find predictability, or what Llewellyn called reckonability,[15] in the law. Some prophetic quality is very much desired in the law. We need predictability so that judges "will find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order."[16]

B. Legal Philosophy

Let's start with some definitions. Because these are my own formulations, I will emphasize, with a nod to Felix Cohen, that a definition I give here is either useful or useless. "It is not true or false, any more than a New Year's resolution or an insurance policy."[17] I make a distinction between philosophy of law and *a* philosophy of law. When I speak of philosophy, I am addressing a very broad inquiry into what the relationship between individuals and government ought to be. In this context, the problems of legal philosophy are problems of normative political philosophy. So perceived, philosophy of law deals with the chief ideas that are common to rules and methods of law as legal precepts in the aggregate. Legal philosophy also deals with the various disciplines that bear directly on the wise solution of a galaxy of problems. Legal philosophy inquires into the problems of terminology, legal methods, the role of precedent, statutory interpretation, underlying rationale, the use of different types of authority, the efficacy of various controls and

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[15]K. Llewellyn, The Common Law Tradition 17 (1960).

[16]Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 476 (1933).

[17]Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 835 (1935).

their operation in diverse factual scenarios, and the basic issues concerning the values that are implemented.

When I speak of *a* legal philosophy, I am addressing the specific answers to these basic inquiries forthcoming from very respectable thinkers, both in academia and on the bench.[18] Each thinker probably articulates or at least demonstrates some particular legal philosophy. Hence, each of their individual solutions to myriad problems of judicial decisionmaking is what I call *a* legal philosophy.

Decisionmaking in the law is not a science capable of being reduced to a neat formula. Decisionmaking is confusing and complex. It involves concepts that general philosophers have found difficult to explain—volition, will, intention, action, choice, and responsibility. Philosophy of law appears to embrace the same problems present in moral evaluation. It addresses those aspects of human nature implicated in other branches of philosophy; philosophy of mind and of action as well as philosophical psychology, all of which describe the nature and relationship of thought, feeling, and action. Because there are no pat answers, it should be expected that individual thinkers would come up with divergent views. Hence, the institutional imperative for a multijudge court.

Some philosophers, for example, have argued that governments exist only to benefit their citizens—the classic Jeremy Bentham utilitarian theory—and that any governmental action is justified only when, and to the extent that, it contributes to the general well-being. Others argue for a more limited government form. They contend that persons are endowed with rights and that government actions are limited by these rights. This theory states that no action is justifiable if it interferes with these rights, and that governments exist to see that rights are protected and to promote well-being only when doing so does not involve infringement of rights. Most of these philosophers give primacy to the individual, but there are those, especially from ancient societies, as well as the modern fascists and nazis, who give primacy to the state as an end in itself. Legal philosophy concerns an inquiry into what kind of society is best; *a* legal philosophy tells us what kind that is.

It is probably safe to say that most modern legal philosophy descends from Jeremy Bentham's benefit theory or utilitarianism—the goal of

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[18]Thoughtful answers to this very abstract subject have been offered by a number of reknowned legal thinkers. A somewhat incomplete list of those who have commanded my attention and possibly influenced me over the years includes: John Austin, Jeremy Bentham, Alexander Bickel, Richard Brandt, William J. Brennan, Jr., Benjamin Cardozo, Giorgio del Vecchio, Lord Alfred Denning, Lord Patrick Devlin, Lord Kenneth Diplock, Ronald Dworkin, Jerome Frank, Stanley Fuld, Lon Fuller, Kent Greenawalt, Erwin N. Griswold, Hugo Grotius, Alexander Hamilton, Learned Hand, H.L.A. Hart, Thomas Hobbes, Oliver Wendell Holmes, Jr., David Hume, Thomas Jefferson, Harry W. Jones, Immanuel Kant, Hans Kelsen, Karl Llewellyn, John Locke, John Stuart Mill, Thomas Morawetz, Robert Nozick, Roscoe Pound, John Rawls, Joseph Raz, William H. Rehnquist, Samuel J. Roberts, Alf Ross, Jean-Jacques Rousseau, Rolf Sartorius, Walter V. Schaefer, James Fitzjames Stephen, Roger J. Traynor, G.B. Vico, Richard Wasserstrom, Herbert Wechsler, and Harry Wellington.

morality is to maximize pleasure and minimize pain.[19] The goal is the greatest happiness for the greatest number.[20] Bentham's basic concepts have been challenged, to be sure. The principal anti-utilitarian arguments state that other moral goals exist besides pleasure, pain, and happiness, and that, moreover, these factors cannot be quantified. Notwithstanding scholarly criticism of Benthamism, I doubt that any appellate judge ever takes a strong position without sincerely believing that his solution is predicated on some theory of benefit.

Ronald Dworkin and John Rawls emphasize that a theory of rights and liberty is more realistic and accurate than the benefits theory.[21] Where so many facets of legal philosophy are concerned, oversimplification is a perilous exercise, but I think we can generalize to the extent that two major schools of philosophical thought are popular today. The utilitarian takes it to be a self-evident truth that governments exist to benefit their citizens. I have often quoted Harry W. Jones in this respect: "A legal rule or a legal institution is a *good* rule or institution when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."[22] Liberty is *one* of several benefits to be conferred on persons. The rights theorists believe otherwise. They believe that governments exist to preserve the independence of individuals from unwarranted interference from other individuals and from government itself. Under this theory, at least under that espoused by Dworkin, in exercising rights, liberty is a "trump" over decisions to implement other benefits through law because it can be derived from the moral presumption that each person is to be treated with equal respect and concern.[23] Dworkin teaches that we have inherited a moral commitment to equality, to equal respect and concern for others, which must underlie any allocation of benefits.[24]

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[19]*See* J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION (Haffner ed. 1970) (rev. ed. 1823).

[20]*Id.*

[21]*See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); J. RAWLS, *supra* note 1.

[22]Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1030 (1974).

[23]R. DWORKIN, *supra* note 21, at xi-xii. *See generally* Sartorius, *Dworkin on Rights and Utilitarianism*, 1981 UTAH L. REV. 263.

[24]*See also* T. MORAWETZ, THE PHILOSOPHY OF LAW 231 (1980):

> One's choice between the two theories may depend upon a fundamental intuition of the following kind. The utilitarian gives priority to the notion of benefit. This means that he would find it plausible to explain the attention we give to so-called rights by saying that we respect rights because this is an important way of benefitting those whose rights are respected. The rights theorist puts matters the other way around. His intuition is that we find it plausible to regard persons as being entitled to being benefitted in certain ways only because we have a certain conception of persons as being entitled by right to respect and consideration as ends in themselves.

All philosophers deal with data about what people say and think and what they do. They critically interpret this data by submitting these raw materials to tests of consistency, coherence, and justifiability.[25] They test the data by considering both the merits of a particular view of society reflected in a judicial decision (or legislative action) and the role of law that the decision exemplifies. In so doing, the philosopher examines the ethical choice that has been made. When it comes to ethics, a case can be made that legal philosophers, as well as judges, fail to distinguish between their own preferences and the preferences of those affected by the action. A society that never has experienced free speech and self-government may not include aspects of liberty in its notion of welfare. Migrant farm workers, unemployed urban black teenagers, and shack dwellers in Appalachia may enthusiastically prefer a meaningful wage, decent housing, and regular food over an abstract guarantee of free speech, free association, free mobility, and free enterprise. One can argue that these liberty values are primarily middle class values that are fundamental only to that class. "Authorities of either the right or left argue that the right to a job, security from criminal violence, and a more equal distribution of wealth are far more 'fundamental' values of the working class."[26] There are preferences in our society, and all judges must recognize this.[27]

For our purposes, I am limiting theories of the philosophers to the uses to which a legal institution has been or may be put and not to the type of institutions they advocate. I am, therefore, not so much interested in descriptive questions about law as I am about normative questions; about how judges assess laws and legal systems in terms of their purposes and how one can evaluate the performance of judges. The inquiry involves not only metaphysics, or the study of the nature of things, but also the philosophy of language. Additionally, this study depends on the recognition that legal philosophies develop and evolve from judicial resolution of real disputes involving concrete facts.[28] Yet though facts be uncontroverted, as we have seen in many constitutional law cases emanating from the federal courts, idiosyncratic notions of ethics run rampant in the process. Each judge is an observer, himself a part of the cosmos he observes, and he has a particular station in it. The functions of the judge's mind and emotions create private perspectives and feelings of wonder, adventure, curiosity, and ultimately,

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[25]*Id.* at 9.

[26]R. NEELY, HOW COURTS GOVERN AMERICA 98 (1981).

[27]"To the extent, therefore, that courts restrain government involvement with the economy in consonance with 'liberal' middle class values, courts merely force their own values on society. The only answer to this is that the pursuit of middle class values furthers economic development, security, and wealth equality." *Id.*

[28]Santayana says that a philosopher cannot wish to be deceived: "His philosophy is a declaration of policy in the presence of facts; and therefore his first care must be to ascertain and heartily to acknowledge all such facts as are relevant to his action or sentiment—not less, and not necessarily more." G. SANTAYANA, REALMS OF BEING xi (1972).

psychic satisfaction. We all have our minimum beliefs and radical presuppositions. All these go into the selection, if not the creation, of the first principle upon which we base our result. Some judges take as first principles nothing more than their accidental prejudices. On this, in constitutional law at least, hangs the distribution of access and power among various groups and institutions. These first principles are what the law of the Constitution is about. "They change over time and develop, and become entrenched as they gather common assent. Beyond them lies policy, and there lie our differences."[29]

Starting points in legal philosophy as in general philosophy are the universals, first principles of some kind, legal or moral.[30] Critical, however, must be the understanding that although a reasoning process is always present, indeed, highly refined, satisfaction with the result is always dependent upon congeniality with the initial proposition of the analysis. The inference proceeds from one "ought to be" to another. In this respect then, legal philosophy is identical with ethical philosophy. We cannot discover an absolute ethical truth, and probably not an absolute legal truth. The closest we can come is where a particular "settled" legal precept forms the initial proposition. Where the analysis proceeds from abstract first principles and not hefty, hearty precedent, less concordance in the result can be expected.

John Hart Ely emphasized that lawyers and judges cannot be the best persons imaginable to tell good moral philosophy from bad. Clergy, novelists, maybe historians, to say nothing of professional moral philosophers, seem more sensible for the job.[31] I am reminded that some decades past, it was suggested that columnist Walter Lippmann, although not a lawyer, was a fine choice for the Supreme Court. From all this, we can safely conclude that legal philosophy can be perceived as a branch of a subdivision of general philosophy. We may conclude that its study is more practical than theoretical, and that it constitutes a study of general first principles, as distinguished from specific and secondary precepts.

C. First Principles

I have suggested elsewhere that the supereminent first principles in the law are five in number: creating and protecting property interests;

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[29]A. Bickel, *supra* note 9, at 142.

[30]General philosophy is the study of first principles because such principles do have the quality of universality, and are related to being, knowledge, and operation. Hence, it is generally agreed that philosophy is divided into the theoretical and the practical. Theoretical philosophy covers the first principles of being and knowledge, and, according to Professor Giorgio Del Vecchio, former rector of the University of Rome, it "is subdivided, in its turn, into the following branches: Ontology or Metaphysics, which includes also Philosophy of Religion and Philosophy of History; Gnosiology or Theory of Knowledge, Logic, Psychology and Esthetics. Practical Philosophy studies the first principles of operation, and is divided into Moral Philosophy and Philosophy of Law." G. Del Vecchio, Philosophy of Law 1 (Martin trans. 1953).

[31]Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 34 (1978).

creating and protecting liberty interests; fulfilling promises; redressing losses caused by breach or fault; and punishing those who wrong the public.[32] Because of the nature of federal court cases, the decisions that attract attention and generate comment implicate first principle liberty interests: political liberty, or the right to vote and seek public office; freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold property; and freedom from arbitrary arrest and seizure. Yet the day-by-day work of the federal courts implicates all five supereminent first principles, not in the atmosphere of divided opinions or judicial creativity, but in what Professor Jaffe has described as "the disinterested application of known law."[33] I think I am safe in suggesting that ninety percent of federal court cases come within this category.[34]

Because these first principles have been common to all legal systems and because they focus on universal legal or moral concepts rather than particulars, we can say that the "big five" form the basis of legal philosophy. They are the fiber and sinew of the theory of law, and we must agree with Holmes that "[t]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."[35] Accordingly, this requires that we concentrate not on particular norms of a social order, but on those that are general and common. Legal philosophy possesses a phenomenological and historical character, a kind of juridical history of mankind. Yet very much implicated in legal philosophy is the tension between the empirical reality and the quest for what we consider an ideal truth. Each judge possesses this feeling of and for justice, a very human inclination to seek out and evaluate what the law ought to be in order to attain our personal ideal. Yet this inclination is most subjective and fraught with deontological overtones. Therefore, we can say that legal philosophy acts as a mediator between synthesizing history and speculating about an ideal.

I have dwelt on the theory of legal philosophy at length because what I propose to discuss in the musings that follow are certain concepts that may be different, one to the other, yet they are related to legal philosophy and to each other. I will discuss federal judges not from the standpoint of a label or nickname, but, as stated above, from the standpoint of legal philosophy, jurisprudence, and jurisprudential temperament.

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[32]Aldisert, *The House of the Law*, 19 Loy. L.A.L. Rev. 755, 765 (1986).

[33]L. Jaffe, English and American Judges as Lawmakers 13 (1969).

[34]It is an educated guess, but other judges and commentators seem to agree. *See, e.g.*, B. Cardozo, The Nature of the Judicial Process 164-66 (1921); Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 Yale L.J. 218, 222-23 (1961); Jones, *Law and Morality in the Perspective of Legal Realism*, 61 Colum. L. Rev. 799, 803 n.16 (1961); Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3 (1966).

[35]O.W. Holmes, Collected Legal Papers 200 (1921).

D. Jurisprudence

I perceive jurisprudence as a concept that is separate and apart from legal philosophy. The principles of legal philosophy are the abstract moral and legal principles, or doctrines or conceptions, that I have called first or supereminent principles. Standing by themselves, first principles do not carry the horsepower of legal rules. They do not describe a detailed legal consequence of a detailed set of facts. I perceive jurisprudence as something else, best described as a body of law that has formal features. It is a system of rules, promulgated by those with power and authority, backed by sanctions, and regulating public behavior. In choosing the term "jurisprudence," I am probably influenced by the expression currently in use in France to describe case law—*la jurisprudence*. Although case law in the French civil law tradition does not have the strong bite of precedent present in the common law countries, the name given to French case law nevertheless expresses at least part of what I comprehend. My meaning goes much further. I use jurisprudence to describe a system of obligatory norms, both substantive and procedural, that shape and regulate the life of a people in a given state (and here I use the term, state, in both the international and American sense). Any valid legal rule is a norm if it is considered a command in the John Austin sense.[36] Yet this binding quality may also spring from the "will" of parties to a transaction as well as from a legislator or it may emerge from the customs of a people or from a general belief that a norm is a rule expressing the notion that somebody ought to act in a certain way.[37]

A given jurisprudence may be in effect for a given people at a given period. For example, when we commonly refer to ancient Roman law, West German law, Italian law, British law, Pennsylvania law, or federal law, we are referring to the jurisprudence of a particular system. Moreover, this jurisprudence takes the form of a body of legal precepts more or less defined, the element to which Jeremy Bentham referred when he said that law was an aggregate of legal precepts.[38] I suppose we may call jurisprudence the by-laws of a given society or rules that govern a given social order. Jurisprudence is law as it is, not as it ought to be. It is more properly a juridical science than a philosophy.

I find it necessary to distinguish between legal philosophy and jurisprudence. Although these are two important elements that go into the make-up of a judge's personality, this distinction is seldom made today by those who evaluate judges and judging. Yet there are grey areas where the line of demarcation between the two concepts is evanescent, if not nonexistent. Sometimes, when we think we are addressing sub-

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[36]"Every law or rule . . . is a command. Or, rather, laws or rules, properly so called, are a species of command." J. AUSTIN, LECTURES ON JURISPRUDENCE 88 (5th ed. 1885).

[37]*See* H. KELSEN, GENERAL THEORY OF LAW AND STATE 30-37 (1945).

[38]J. BENTHAM, *supra* note 19, at 324.

stantive law, it may be more philosophy than jurisprudence, or maybe a little of both. The concepts are not mutually exclusive. Take, for example, two dimensions of law articulated by Roscoe Pound. In addition to being a legal precept in the aggregate sense, law may be considered as "a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice."[39] Moreover, law may be considered as "a body of philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof."[40]

If a judge is truly following "a body of traditional ideas," he is probably observing the law as it "is" and not as it "ought to be." If we talk about law as it should be, we are not dealing with juridical science, or what we have been calling jurisprudence. Instead, we have entered the world of philosophical generalities. Immanuel Kant suggested that the distinction existed in two simple Latin words. When we ask *quid jus?* we are seeking some general principle of philosophy to help us decide what the law ought to be. When we ask *quid juris?* we are seeking what already has been established as part of the jurisprudence.[41] From this I think we can say that when we seek that which *must* or *ought to be* in the law, in contrast to that which *is*, we are in the realm of legal philosophy. As I said before, this can be an extremely subjective exercise with deontological overtones. I think we can safely say that when a judge resorts to legal philosophy for assistance, he or she looks at law in its logical universality, seeks its origins, notes the general characteristics of its historical development, and tests it according to very personal ideals of justice, personal ideals that must be drawn from pure reason in order to avoid idiosyncratic arbitrariness.[42]

But unfortunately the line between what the law *is* and what it *ought to be* is not always a bright one. One legal precept, pushed to the limit of its logic, may point to one result; another precept, followed with like logic, may point with equal certainty to another result. For example, assume the presence of two contradictory legal precepts and that a choice must be made between the two. Where choice of two competing precepts is involved, and often it is, are we faced with a case of what the law *is* or what it *ought to be*? Is the answer found in the jurisprudence, or is a resort to general philosophical principles necessary? Or take the questions posed by Cardozo:

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[39]Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923).

[40]*Id.*

[41]G. DEL VECCHIO, *supra* note 30, at 2. *See* I. KANT, THE PHILOSOPHY OF LAW 43-46 (Kelley ed. 1974) (Hastie trans. 1887) (2d ed. 1798).

[42]Ahrens lumped the philosophy of law with natural law stating that it "sets forth the first principles of Law, conceived by reason and founded upon the nature of man considered in itself and in its relationship with the universal order of things." *Quoted in* G. DEL VECCHIO, *supra* note 30, at 4 n.2.

> If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[43]

E. Jurisprudential Temperament

It is here where that quality which I call jurisprudential temperament, or the judge's intuition, comes into play.[44] This temperament invariably influences the decision. It inclines the decision one way or another. It is a major determinant of whether the case is controlled by precedent or settled law. That is to say, this temperament determines whether the result is found in the jurisprudence, or whether the result requires a choice between two competing precepts, also in the jurisprudence, or whether the case requires movement to square one—recourse to first principles.[45] In the federal courts, especially in constitutional law spinoffs in actions brought under 42 U.S.C. § 1983, the judge's view of the role of the court is all-important. There is probably more subjectivity brought into play in these cases, more activity on the intuition scale, than in any other aspect of the law. Much of this problem can be laid at the door of the Supreme Court because it has served up a mishmash that furnishes no identifiable criteria as to what are garden variety common law torts dressed in the tinsel and glitter of fourteenth amendment deprivations and what are truly important and, to use a favorite word,

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[43]B. CARDOZO, *supra* note 34, at 1.

[44]Jurisprudential temperament is not to be confused with the more familiar judicial temperament, the lawyer's evaluation of the judge's demeanor in open court. The lawyer's universal perception of the judge with ideal judicial temperament is the one described by West Virginia Justice Richard Neely: "colorless, odorless, and tasteless." R. NEELY, *supra* note 26, at 213. It is a judge who is always patient and courteous, who never interrupts a lawyer, never asks a question, never raises his voice, never frowns, and always smiles. Under these criteria, Oliver Wendell Holmes, Learned Hand, and Roger J. Traynor would have passed into oblivion. *See* Aldisert, *What Makes a Good Appellate Judge*, JUDGES J., Spring 1983, at 14 (appellate judges should strive to attain the qualities of: fairness, justness, impartiality; devotion and decisiveness; clear thought and expression; professional literacy; institutional fidelity; and political responsibility).

[45]What Judge Walter V. Schaefer said in a related context closely approximates the judge's intuition thermometer, or what I am describing as jurisprudential temperament:

> [M]ost depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.

Schaefer, *supra* note 34, at 23.

"fundamental" rights. To federal circuit and district judges, this may be what Winston Churchill is reported to have said of a pudding someone served him: it seems to lack a theme.[46]

Yet I hasten to add that federal court decisionmaking is not subjectivity run rampant. In terms of numbers, quite the contrary is true. As I indicated before, most tasks, perhaps eighty to ninety percent, involve a kind of mechanical process: the law and its application alike are clear; or the law is clear and the sole question is its application to the facts.[47] The results in these cases are often predetermined, some, from the instant the complaint is filed. But where the result is not predetermined and the law is not clear, the courts are faced with what Hart called the "penumbral" cases, where the language of the legislation or the Constitution is intentionally general.[48] I will address statutory construction in detail later,[49] but for now we must recognize that some statutory language is inevitably vague because the legislator who can anticipate and decide all the particular cases that will fall under a given statute has yet to be born.

Whether judges must, in certain cases, resort to a penumbral area of the law reflects a value judgment and is indicative of the judge's jurisprudential temperament. Some judges have lower thresholds than others, and are more inclined to find solace in shades and fringes rather than the black letter law. But when they so function, it means that they have exhausted the guidance that hefty, hearty precedents can give and they feel that they must turn to other resources. These resources are found in the body of first or supereminent principles, legal or moral, that form the body of legal philosophy.[50] Dworkin suggested that when this occurs, the decision depends "on the judge's own preferences among a sea of respectable extralegal standards, any one in principle eligible, because if that were the case we could not say that any rules were binding."[51] In this respect, the nature of the temperament may be reflected by the particular choice of moral values offered by diverse philosophers. Those whom we may call the naturalists will claim that law is best explained by reference to natural moral principles, principles inherent in the notion of an ideal society and the moral potentiality of persons. Yet Austinian positivists will claim that law is best understood formally as a system of orders, commands, or rules enforced by power. Moreover,

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[46] *Quoted in* Fried, *Correspondence: Author's Reply*, 86 YALE L.J. 573, 584 (1977). A dimension of the jurisprudential temperament encountered in our judges can be illustrated by a playwright's attribution to Saint Thomas More: "The law, Roper, the law. I know what's legal, not what's right. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager." R. BOLT, A MAN FOR ALL SEASONS (1966).

[47] *See supra* notes 33-34 and accompanying text.

[48] H.L.A. HART, THE CONCEPT OF LAW 121-22 (1961).

[49] *See infra* notes 204-65 and accompanying text.

[50] *See supra* notes 32-43 and accompanying text.

[51] R. DWORKIN, *supra* note 21, at 51.

although consistency is required of a legal system, that is to say, stated reasons in the cases must be consistent with legal or moral principles, the collection of private moral decisions by judges need not necessarily be consistent. The judge may pick and choose in various cases among the various philosophies expressed by our writers and judges, one time following a rights theorist, another time, a garden variety Benthamite.

But to understand jurisprudential temperament is to recognize that the judge's initial reaction as to whether a case is controlled by precedent (or by unambiguous statutory language) or comes within what Hart called the penumbral area is itself a gauge of that temperament.[52] As I said before, we judges have different thresholds, or as Emerson said, "We boil at different degrees."[53] What makes a case controversial or difficult at times is precisely this difference. It makes the difference whether a utilitarian weighing of material benefits is preempted by a right. Dworkin offers some advice here. A useful definition of a hard case is one in which existing case law and statutes, the presence of precedents and other immediately relevant rules of decision, tend to generate or fit a result that offends the judge's intuitions about benefit and harm.[54] These are the intuitions that constitute his temperament. Yet these reactions should not be mechanical, as the label-tossers of "liberal" and "conservative" would have us believe. Neither, however, should they be unpredictable. Our legal system is both a system and a history of reasons; reasons that judges have given for past determinations and reasons that embody many conceptions of human nature. The judge's matured decision must be informed by this history. His own determination of benefit and harm will be informed by consulting the justifications offered by other judges in other relevant opinions. Dworkin described this task as an ideal, and stated that it demands a judicial Hercules.[55]

But alas, we are not all Hercules. Judges are merely human beings. The inflow from the cumulative experience of the judiciary mixes with what is already in the judge's mind. What is already there is an accumulation of personal experience including tendencies, prejudices, and maybe biases. I don't mean conscious biases, but the unconscious ones that any person may have and which the judge cannot eradicate because he does not know they are there. One of these may be a bias in favor of the justice or equity of the particular case and against any precedent

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[52]Lord Denning, a British cousin, tells us exactly where his temperament stands on the gauge:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which is not done before, we shall never get anywhere. The law will stand still whilest the rest of the world goes on: and that will be bad for both.

Packer v. Packer [1953] All E.R. 127, 129.

[53]R.W. EMERSON, SOCIETY AND SOLITUDE 92 (1870).

[54]*See* R. DWORKIN, *supra* note 21, at 89-90.

[55]*Id.* at 125-30.

or law that seems to deny it. This is an example of temperament. When such a feeling dominates, the judge's mental notes may emphasize those facts that he deems to be significant; the insignificant, being omitted, will disappear from his memory. The facts will be molded to fit the justice of the case, what Lord Devlin calls "the aequum et bonum,"[56] and the law will be stretched. Yet another judge may possess the same intensity of justice for the case, but will refuse to stretch the law, and instead state, "We are constrained to hold . . . ." In these two cases, the feelings of justice are the same. But disparate jurisprudential temperaments command different results.

Another factor of temperament to be considered is the treadmill upon which United States circuit judges run these days. On my court, each judge was charged with over 300 fully-briefed cases to decide on the merits in fiscal year 1985. In addition, a like number of petitions for rehearing and a like number of procedural motions march into chambers at a grueling one-a-day rate. The judge must possess highly refined administrative talents simply to keep current, let alone to allow time for research and reflection. (Most do have sufficient administrative talents, but some do not and indeed are constantly harried.) We exhibit a wry smile when we read such statements as one emanating from Alexander Bickel: "Judges have, or should have, the *leisure*, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."[57]

I have emphasized the complexities that abide within concepts of legal philosophy, jurisprudence, and jurisprudential temperament only to illustrate the sophistication of our subject matter. Without purporting to identify certain characteristics of the federal judiciary in order of importance, I start with a matter that has occupied much attention in the press. William French Smith, the first Attorney General in the Ronald Reagan cabinet, made the statement that the administration did not intend to appoint as federal judges those who believed in judicial lawmaking.[58] He was not alone in expressing such sentiments, for we often hear that judges are not to make law, but must only interpret it.

II. The Judge as a Lawmaker

The subject of judicial lawmaking, therefore, deserves a full treatment. It is relevant when a judge crosses his threshold of settled law or plain meaning in terms of the ongoing debate on the proper judicial exercise of the lawmaking role. Perhaps Richard Nixon brought this question to the forefront of public debate with his stated desire to appoint "strict constructionists" to the federal bench. The discussion, however, of the judge's role as a lawmaker is not new among legal

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[56]P. Devlin, The Judge 84-116 (1974).

[57]A. Bickel, The Least Dangerous Branch 25-26 (1962) (emphasis added).

[58]Remarks before the Federal Legal Council in Reston, Va., on Oct. 29, 1981, *reprinted in* N.Y. Times, Oct. 30, 1981, at 22, col. 1.

scholars and greatly antedates the recent tempest. For example, John Chipman Gray often quoted Bishop Hoadly's 1717 statement: "Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is he who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them."[59] Also, latter-day recognitions appear to be far removed from Francis Bacon's admonition: "Judges ought to remember that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law, or give law."[60]

A careful inquiry into how a given judge perceives his role as a lawmaker will provide greater insight into his jurisprudential temperament than a resort to adjectival labels of "activist" or "strict constructionist." Jurisprudential temperament is always more important than the more familiar characterization of judicial temperament.[61] A judge's willingness to indulge in judicial lawmaking may be said to vary inversely with a psychology that reflects a sense of limitation and a sparse inclination to act originally or creatively. Similarly, a judge's willingness to rely strictly on precedent also may be said to vary inversely with his acceptance of Professor Harry W. Jones' philosophy that a good rule is measured by the extent to which it contributes to "the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."[62]

The arguments against judicial lawmaking are formidable. Certain commentators and sections of society argue that a lawmaking court crosses the Rubicon that divides judicial and legislative powers, that when the courts do this they are "sneaking in disguises" as they spin off impressive by-products of ad hoc decisions. Lord Devlin has said that "[p]addling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of a river by an army in uniforms and with bands playing."[63]

A. Theories of Judicial Lawmaking

In order to lay the groundwork for this discussion, I must first establish the three theories of judicial lawmaking that can be identified:

1. Judges do not create law; they do not "make" law, they merely discover and apply that which has always existed.
2. Judges can and do make law on subjects not covered by

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[59]J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 120 (1909). Benjamin Hoadly was the notorious Bishop of Bangor whose sermon preached before King George I of England on March 31, 1717, is said to have precipitated the heated theological dispute known as the Bangorian controversy. The above quote, taken from the text of "My Kingdom is Not in This World," shows that the gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers.

[60]F. BACON, *Of Judicature*, in ESSAYS CIVIL AND MORAL 58 (Murphy ed. 1876) (1625).

[61]*See supra* note 44.

[62]Jones, *supra* note 22, at 1030.

[63]P. DEVLIN, *supra* note 56, at 12.

previous decisions, but they cannot unmake old law; they cannot even change an existing rule of judge-made law.

3. Judges can and do make new law, can and do unmake old law, i.e., law previously laid down by themselves or by their judicial predecessors.

The first theory has its roots deep in the history of the common law. Writing in the seventeenth century, Sir William Hale said that decisions of courts cannot

> make a law properly so called, for that only the King and Parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is, especially when such decisions hold a constancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such whatsoever.[64]

Later, Blackstone taught that decisions of courts are evidence of what is common law.[65] And as late as 1892, Lord Esher said: "There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."[66]

These English views found acceptability in the United States as late as the mid-nineteenth century when, in the 1842 case, *Swift v. Tyson*, the Supreme Court stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws."[67] Such views, however, were not without substantial critics. For example, Sir George Jessel had remarked:

> It must not be forgotten that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the chancellors who invented them."[68]

Although Blackstone, with his profound influence in Great Britain and early America, proclaimed that judges did not create law but simply discovered something that was already there, or in Holmes' striking

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[64]W. Hale, History of the Common Law (1713), *quoted in* R. Cross, Precedent in English Law 26 (3d ed. 1977).

[65]1 W. Blackstone, Commentaries 88-89 (1796).

[66]Willis v. Baddeley, [1892] 2 Q.B. 324, 326.

[67]Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

[68]*In re* Hallett's Estate, 13 Ch. D. 696, 710 (1880).

phrase, that was "a brooding omnipresence in the sky,"[69] it would have taken some persuasion to convince an active English practitioner that judge-made law did not control. He would not begin to think that precepts related to offer and acceptance, liability through fault, contributory negligence, proximate cause, foreseeability, and the like were not the law because they were created by the courts rather than Parliament. Indeed, Blackstone's view would allow the argument that a judgment of the House of Lords was not law because it conflicted with settled principles of common law that were always hanging out there, simply waiting to be discovered. Yet the theory is not without current supporters. We have been told that to claim that courts make law is to assert that courts habitually act unconstitutionally.[70]

But the reality is that law always has been, is, and, according to Jerome Frank, always will be

> largely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.
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> Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one could foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times.[71]

Notwithstanding impressions of some modern critics, judicial intervention in the political process of the legislative and executive branches of American government is not a recent phenomenon. The courts' role as a lawmaker boasts a very ancient vintage. Within fourteen years of the Constitution's adoption, a new dimension was added to the judiciary's traditional role of common law dispute settler. Resolving a conflict between a private citizen, one William Marbury, and James Madison, the Secretary of State, the Supreme Court set a precedential stage for a new judicial function—that of interpreter of a written constitution.[72] The Court allocated to itself a role that still serves, in some quarters, as a source of criticism of the American judicial function today. The Court declared an act of a correlative branch of government unconstitutional, i.e., null and void.[73] The Court deigned to tell the executive branch what it could and could not do under the Constitution. Thus,

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[69]Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes J., dissenting).
[70]Zane, *German Legal Philosophy*, 16 MICH. L. REV. 288, 337-38 (1918).
[71]J. FRANK, LAW AND THE MODERN MIND 6 (1949).
[72]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[73]*Id.*

early in our tradition, the judicial branch declared itself the overseer of the executive and legislative branches. *Marbury v. Madison* marked the departure from the traditional dispute-settling role of the courts and the arrival of a new function, that of interpreting a written constitution. Said Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[74] We have seen the Supreme Court, and other courts, develop the interpretive function during the years since *Marbury v. Madison*.[75] Thus, by 1972, in *Illinois v. City of Milwaukee*,[76] the Supreme Court emphasized that in the context of state laws, court decisions were laws; similarly, federal common law decisions were laws just as surely as those of statutory origin.[77]

It bears repetition, however, that for ninety percent of his time, the judge is submerged in the disinterested application of known law and that his inclination or disinclination to creativity does not surface. (Nor do the labels "liberal" or "conservative" appear.) In these cases, all that seems to be desired are the virtues of balance, patience, courtesy, and detachment. Lord Devlin has noted:

> [L]aw is the gatekeeper of the status quo. There is always a host of new ideas galloping around the outskirts of society's thought. All of them seek admission but each must first win its spurs; the law at first resists, but will submit to a conquerer and become his servant.[78]

Notwithstanding the occasional hue and cry that appears after certain cases, there is generally little public interest in the common law as a whole. When the public becomes interested in an issue, it calls upon the legislature, and leaves the rest to plodding judges.

Examples of judicial lawmaking in traditional "lawyer's law" may be found in abundance. Some are firmly grounded on considerations of public policy. Others embody judicial pronouncements relying on the Cardozon methods of philosophy, evolution, or tradition. To identify but a few: in *Moses v. MacPherlan*,[79] a case of first impression in 1760,

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[74]*Id.* at 177. Thirteen years later the Court extended this constitutional supervision to decisions of state supreme courts. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[75]Professor Robert A. Leflar relates: "We know that courts make law, in fact, that they have made most of the law that we have. This is the way the common law has always been made . . . ." Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 323-24 (1971). Sir Rupert Cross, quoting Mellish, L.S., suggests that it has not been otherwise in England: "The whole of the rules of equity and nine-tenths of the common law have in fact been made by judges." R. CROSS, *supra* note 64, at 28 (quoting Allen v. Jackson, 1 Ch. D. 399, 405 (1875)).

[76]406 U.S. 91 (1972).

[77]*Id.* at 99-100.

[78]P. DEVLIN, *supra* note 56, at 1.

[79]2 Burr. 1005, 96 Eng. Rep. 120 (1760).

the Court of King's Bench allowed plaintiff to recover money obtained by the defendant in a deceitful manner; in 1905, the Supreme Court of Georgia permitted a new action for invasion of privacy,[80] although in 1902 New York had refused to do so;[81] the Supreme Court has created a wrongful death action for maritime law;[82] and Massachusetts has announced a common law wrongful death action in tort.[83] In 1973, Florida abolished the contributory negligence rule and replaced it with comparative negligence;[84] California followed suit in 1975.[85] The "Fall of the Citadel"[86] in products liability cases and the abrogation of hoary immunity rules[87] are likewise the products of judicial lawmaking. In 1979, the Supreme Court reaffirmed its 1975 declaration that "[a]dmiralty law is judge-made law to a great extent."[88]

Ample jurisprudential authority supports the lawmaking function of courts that operate in the common law tradition. There appear to be no limits on changing prior judge-made law because, with Cardozo, we have accepted the proposition that

> [a] rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.[89]

This is a recognition that "the common law, in its eternal youth, grows to meet the demands of society."[90] At the appellate level, this growth of the law is reflected by overruling a precedent, fashioning a new rule, or extending a new precept to reach a novel issue. All of this is now widely accepted judicial lawmaking.

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[80]Pasevich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[81]Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[82]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

[83]Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972).

[84]Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

[85]Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[86]*See* Prosser, *The Fall of the Citadel* (*Strict Liability to the Consumer*), 50 MINN. L. REV. 791 (1966).

[87]*See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) (governmental); Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965) (charitable).

[88]Edmunds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) (citing United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975)); *see also* Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963).

[89]B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924).

[90]Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

Therefore, the stark reality is that the modern American experience recognizes that the judge can, and indeed must, make law as well as apply it. Were it otherwise, there would be little room for the employment of public policy as a tool in judicial decisionmaking. Yet, there are limits. In 1917, Holmes counseled,

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*.[91]

Whether the courts do or do not make law in the United States was essentially of interest only to legal philosophers until recently. So long as the courts dealt with lawyer's law, it seemed to have been fair game for the courts to spin and weave the law on a case-by-case basis. Lawyers understood this because they did not subscribe to "the lay attitude that the law is definite and certain. That is, the unchanging law is there to be found and followed if a jurist faithful to his oath will only look for it."[92] It was only when the courts gave new life to the fourteenth amendment and began to move from private law to public law that the hue and cry became strident for a resurrection of junior high school concepts that seem to teach that the legislature makes law, the executive administers it, and the court simply interprets it. Starting in the 1960's, when the Supreme Court began by the process of selective incorporation of the Bill of Rights into the fourteenth amendment to hold the states to higher standards of responsibility to their inhabitants, we began to witness and hear heated public discussions on the jurisprudential temperaments of our judges. We began to chant the litany of the now familiar labels—activists, strict constructionists, liberals, conservatives, and what have you.

B. New Premises

Concluding that judges create, as well as discover, law does not really answer the major questions of the judge's role in the judicial process. Nor, I suggest, does it eliminate pigeonholing, or label-affixing, or name-calling. We have to inquire as to what limits, if any, should be imposed on judicial lawmaking. Clearly the venerable formulae of Holmes, interstitial lawmaking, and Cardozo, gap-filling, are not viable today, and really were never quite accurate. Cardozo's decision in

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[91]Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
[92]Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563, 564 (1976).

MacPherson v. Buick Motor Co.,[93] went far beyond mere gap-filling, and the basic theme of Holmes' *Path of the Law*[94] was more molar than molecular. When a court abolishes the doctrine of contributory negligence in favor of comparative negligence, or adopts strict products liability and jettisons negligence precepts, as did forty jurisdictions between 1966 and 1979, or abolishes governmental immunity or revolutionizes choice of law doctrine, *lex loci contractus* and *lex loci delictus*, as virtually all our jurisdictions have done since 1954,[95] we can scarcely pontificate that there are clear limitations to judicial lawmaking today. Rather, I believe we should proceed candidly along a new set of premises. These should include the following:

1. The legislature is the primary source of lawmaking.
2. Where the legislature has not affirmatively acted, the only bounds of judicial lawmaking are limitations imposed by the Constitution.
3. Because of the needs of an organized community, it is desirable to impose restrictions on the *process*, but not on the *scope* of judicial decisions.

The first premise is important. A substantial body of thinking argues that in a representative democracy, lawmaking authority should not extend to judges but should be restricted to legislators who are openly responsible to the electorate. It is hard to quarrel with the proposition that those affected by lawmaking should have the right to endorse or reject the voting record of the lawmaker every two, four, or six years. Moreover, popular control over judge-made law is virtually nonexistent because the subtleties of judicial lawmaking are not easily recognizable by the lay public. Often decisions made in the legal world, revolutionary in form, are hardly noticed outside of it.[96] Even if the reality of judicial lawmaking were comprehended, when judges are elected, their terms are longer than those of legislators. This diminishes the opportunity for timely and effective action. Although most judges are still elected, some states, New Jersey, for example, mandate lifetime appointments for their judges.[97] A goodly number of state judges are eventually removed from the political processes by the various retention systems patterned after the Missouri plan, in which an incumbent runs on his own record on a yes or no basis, rather than against a specific opponent.[98]

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[93]217 N.Y. 382, 111 N.E. 1050 (1916).

[94]Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[95]The landmark case is probably Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[96]*E.g.*, the American cases adopting RESTATEMENT (SECOND) OF TORTS § 402A abolishing the necessity of primary fault in products liability cases. *See also* Donaghue v. Stevenson, [1932] A.C. 562.

[97]N.J. CONST. art. 6, § 6, ¶ 3.

[98]MO. CONST. art. 5, § 25(G).

Yet another point of view is equally formidable. In an era of positive law, we can probably agree to certain basic concepts: substantive law is that which is promulgated by the sovereign; in the American democracy model the people are sovereign; and the people have delegated lawmaking power to the legislature. Accordingly, we can recognize that even within strictures of the separation of powers, judicial lawmaking is acceptable and legitimate because the courts are merely the subordinates or subjects of the sovereign legislature. What judges have originally granted, their mandate then representing the general approval of the times, can be withdrawn by the judges when they feel that general approval no longer exists. We have a special word for this. We call it "overruling" a past decision. Moreover, if legislative authority disagrees with judicial action, the state and federal legislators can overrule that action by statute.[99] As the highly pragmatic legal philosopher John Chipman Gray observed, legislative acts are paramount to all other sources of law.[100] Therefore, counteracting the contention that judicial lawmaking evades control by the electorate is the reality that politically responsible legislatures can usually abrogate judge-made law by statutory enactments. Recent examples of this surfaced in the area of sovereign immunity against tort claims. After the Illinois Supreme Court abolished governmental immunity in *Molitor v. Kaneland Community Unit District No. 302*[101] in 1959, after California did the same in *Muskopf v. Corning Hospital District*,[102] and after Pennsylvania abolished sovereign immunity in *Mayle v. Pennsylvania Department of Highways*[103] in 1978, each of the state legislatures passed amendatory statutes.[104]

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[99]*See, e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 42, 163 N.E.2d 89, 104 (1959) (Davis, J., dissenting), *cert. denied*, 362 U.S. 968 (1960); *cf.* W. FRIEDMANN, LEGAL THEORY 501-03 (5th ed. 1967). *See also* Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 767-72 (1965).

[100]J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 124 (2d ed. 1921). John Austin taught that rules judges make "derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rule which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." J. AUSTIN, THE PROCESS OF JURISPRUDENCE 28 (1932).

[101]18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[102]55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[103]479 Pa. 384, 388 A.2d 709 (July 14, 1978) prompting swift passage of the Pennsylvania Sovereign Immunity Act, 42 PA. CONS. STAT. § 5110 (effective September 28, 1978) (repealed 1980).

[104]*See* 1963 Cal. Stat. ch. 1715 (codified at CAL. GOV'T CODE §§ 900-935 (West. 1980)); Pub. Act 77-1776, 1971 Ill. Laws 3446 (codified as amended at ILL. ANN. STAT. ch. 127, para. 801 (Smith-Hurd Supp. 1986)); 42 PA. CONS. STAT. § 5110 (1979) (repealed 1980).

There have also been constitutional amendments designed to overrule specific Supreme Court decisions. These include the enactment of the eleventh amendment to the Constitution to overrule specifically the Supreme Court's holding in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (state could be sued by a citizen of another state); the fourteenth amendment response to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); the sixteenth to Pollak v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); and the twenty-sixth to Oregon v. Mitchell, 400 U.S. 112 (1970). Nevertheless, the disastrous attempt to enact the Equal Rights Amendment in the late 1970's and early 1980's demonstrates how very difficult it is to amend the Constitution.

The other premises limit judicial lawmaking. The first is obvious, and needs no discussion—the Constitution limits both state and federal legislative and judicial lawmaking. John Marshall settled this issue many years ago.[105] The last premise stakes out no bounds on substance, but places an effective halter on the way things are done. I think this can be done legitimately, based on formidable legal and moral principles and traditions, and also effectively, when viewed from the pragmatic side. I propose a model that incorporates certain philosophical bases previously suggested by Ronald Dworkin,[106] Harry H. Wellington,[107] and Herbert Wechsler.[108] It is a model of the decisional process that strips a decision of all *obiter dictum*, and limits the holding to a narrow rule setting forth a detailed legal consequence to a detailed set of facts affecting rights of parties who have appeared before the court and have had the opportunity to vindicate or defend against the specific rights implicated in the decision.

C. Common Law Model

My model follows the common law tradition and resolves to this: legitimate judicial lawmaking knows no express bounds as long as the court operates within the limitations of the Constitution and legal precepts originally produced by judicial creativity. I do not restrict the form of the judicial decision to interstitial activity nor do I relegate the court to a gap-filling role. Clear restrictions, however, are placed on the judicial process. The judiciary is not free, as is the legislature, to decide a case solely on the basis of the good of the collective body or to advance or protect some collective goal of the community as a whole. That process of lawmaking is relegated to the legislative branch and is what I call the collective goal model of lawmaking. The judiciary, however, is free to participate fully in what I call the principled rights model so long as the following mandatory procedures are meticulously observed. First, a court may adjudicate only the rights of the individuals or groups before it who have had a full opportunity to advance or protect some individual, social, or public interest in the subject matter of the litigation. The judiciary may not accept demands that may affect individuals or groups who are not parties to the litigation and therefore are, legally speaking, innocent bystanders. The development of the common law is an incremental process, a sort of connect-the-dots exercise from which broad precepts (principles and doctrines) are eked out from narrow rules emanating from individual cases. The law develops slowly like a coral reef is formed. Lord Wright once put it in a picturesque phrase: "[T]he

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[105]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[106]Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-62 (1975), *reprinted in* R. DWORKIN, *supra* note 21, at 81, 82-86 (1977).

[107]Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

[108]Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

judges proceeded from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea . . . ."[109]

Second, the decision must be based on recognized legal principles or upon reasoning based on some justificatory principles of morality, justice, social policy, or common sense. To this extent, the decision must meet the Wechslerian test "that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[110] "A decision may, in short, be wholly principled and wrong . . . . it cannot be unprincipled and right."[111]

Third, any determination of public policy must be based on a concept of morality reasonably calculated to find acceptance in the social group intimately affected by the decision, or if it runs in advance of a consensus, it must meet the criteria of public policy determination, discussed hereinafter.[112] The decision cannot legitimately be based on moral principles or ideals held by an individual judge that are not supported by universally held moral or legal principles.

Fourth, the decision must be relatively neutral in the sense that it does not impose special burdens or confer favors on a special interest group unless there are special principled reasons for doing so. Finally, as I shall also discuss later,[113] the judge's "reasoned elaboration" must be fully set out in an opinion. The public is entitled to know not only "the what" of a decision, but also "the why."

To the extent that these restrictions are meticulously observed, the judge can be a law-giver in the true Bishop Hoadly sense.[114] Accordingly,

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[109]Wright, *The Study of Law*, 54 LAW Q. REV. 185, 186 (1938).

[110]Wechsler, *supra* note 108, at 15.

[111]Address of H. Wechsler, Toward Neutral Principles, Revisited, Federal Appellate Judges' Conference, Federal Judicial Center, Washington, D.C. (March 12, 1975) *reprinted in* R. ALDISERT, THE JUDICIAL PROCESS 543, 545 (1976).

[112]*See infra* notes 180-84 and accompanying text.

[113]*See infra* notes 185-289 and accompanying text.

[114]*See supra* note 59. However, even the true law-giver is well advised to heed the advice of Dean Erwin N. Griswold:

> Though it is clear that judges do "make law," and have to do so, it remains the fact that this is, at its best, an understanding process, not an emotional one, a self-effacing process, not a means of vindicating "absolute convictions." It is a process requiring great intellectual power, an open and inquiring and resouceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them. If one regarded himself as having a special mission to fulfill, or if he were quite largely the prisoner of his absolute convictions, he would not meet the highest standards of judicial performance. When decisions are too much result-oriented, the law and the public are not well served.

Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 94 (1960). At bottom, then, what probably must keep judicial lawmaking in bounds is a sense of restraint. Judge Jack G. Day has suggested that "[a] judge consciously sensitive to his creative duty, and its limitations, is more apt to be conscious of his obligation to fulfill the duty with restraint." Day, *supra* note 92, at 593.

I have no difficulty in concluding that judicial lawmaking is a traditional aspect of American jurisprudence. Born in the English common law tradition, absorbed in both the colonial and our early state systems, nourished by the original landmark cases interpreting the Constitution, and freely developed through the years, it is a legitimate function of the courts. Judicial lawmaking is also the function of the courts where the judge's jurisprudential temperament is most keenly involved. Having said this, I add a most important caveat: judicial lawmaking is usually only a by-product of a decision reached in an actual case or controversy. It is a secondary process, and thus differs from laws that emanate from the legislature where the promulgation is the product, not the by-product, where it is the primary, and not the secondary, function of the lawmaking organ.

In constitutional law, however, the federal court has an even more heightened role, for here the judiciary is not a mere delegate of the sovereign legislature. Here, not the Congress, not the Executive, but the federal court is the sovereign. The awesome importance of a court of appeals panel decision on constitutional law, therefore, cannot be overemphasized.[115] More often than not, a decision by a majority of a three-judge panel is usually final; a decision by the Supreme Court is always so. And it is here that what I have termed jurisprudential temperament, a willingness to resort to first principles, is most vividly illuminated.

III. The Judge as a Declarer of Public Policy

Recent criticism of federal judges—whether as lawmakers or as interpreters of constitutional or statutory law—has been particularly strong where judges have based decisions on considerations of public policy. Such decisions generate controversy on both political and institutional grounds. Public policy issues more readily inspire the familiar political science labels of "liberal" or "conservative;" judicial declarations of public policy thus more easily provoke criticism from a political, rather than a jurisprudential, perspective. Other critics argue from an institutional perspective, contending that articulating policies for the public interest is the task of the state and national legislatures rather than the federal judiciary. Judges who seek to advance the common good expressly through policy making are accordingly pilloried as "unrestrained" or "activist." This controversial aspect of the judicial process demonstrates the interplay in the trichotomy of legal philosophy, jurisprudence, and jurisprudential temperament.

In light of such criticism, Roger J. Traynor has admonished us not to "be misled by the half-truth that policy is a matter for [only] the legislators to decide."[116] The courts are continually called upon to weigh

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[115]Aldisert, *supra* note 32, at 798.

[116]Traynor, *Reasoning in a Circle of Law*, 56 Va. L. Rev. 739, 749 (1970).

considerations of public policy when adding to the content of the common law, filling in statutory gaps left by an inattentive, divided, or politically sensitive legislature, and applying constitutional precepts to changing and novel circumstances. In all these aspects of the judicial process, considerations of policy may be appropriate or even decisive. David A.J. Richards emphasized the same point, noting that policy considerations underpin even the threshold doctrines of justiciability.[117]

These American authorities have rejected sentiments voiced by English judges of an earlier era: that "public policy is a very unruly horse and when once you get astride it you never know where it will carry you;"[118] and that judges are more to be trusted as interpreters of the law than as expounders of public policy.[119] The venerable Lord Denning has applied the modern view in his discussion of the measure of damages in a tort case:

> At bottom, I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable—saying that they are, or are not, too remote—they do it as a matter of policy so as to limit the liability of the defendant.[120]

Judge James D. Hopkins was similarly realistic in declaring that among the several devices available as bases for decisions—such as maxims, doctrines, precedents, statutes—public policy is primary. The other grounds for a judicial decision must yield to the declaration of public policy, once that policy is ascertained.[121]

Although much of the controversy concerning judicial implementation of public policy is of recent vintage, the practice itself is well established in common law adjudication. As early as 1881, Holmes wrote in *The Common Law*:

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[117] [T]he proper ends of adjudication surely at least sometimes include policies. For example, the many discretionary rules of standing, ripeness, mootness, and the like clearly rest in part on policies of conserving judicial resources, a social policy of maximum output from limited inputs. Even aside from the problematics of the proper weight of principle and policy in understanding these rules, many cases of adjudication on the merits clearly invoke policies, as in many cases of statutory construction. Even where there is no clear legislative intent, courts invoke policy considerations *sua sponte* in order to effectuate a sensible legislative result; the burgeoning area of federal common law is one example.

Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1097-98 (1977).

[118] Richardson v. Mellish, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.).

[119] *In re* Mirams, [1891] 1 Q.B. 594, 595.

[120] Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd., [1973] Q.B. 27.

[121] Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 323 (1971).

> The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[122]

The importance of these considerations to judicial decisionmaking notwithstanding, it is well to remember that judges are far more constrained than legislators in fashioning or declaring public policy. Dean Harry H. Wellington offers the thoughtful assertion "that when a court justifies a common law (as distinguished from a statutory or constitutional) rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral."[123] This presents the obvious question as to how may, indeed, how can, a court determine whether a policy is socially desirable? Wellington recommended that in fashioning common law on public policy grounds, the court first look

> to the corpus of law—decisional, enacted and constitutional—to determine whether relevant policies have received legal recognition . . . .
>
> In determining the extent of a policy's social desirability, a court should examine such things as political platforms, and take seriously—for this purpose—campaign promises and political speeches. The media is a source of evidence and so too are public opinion polls. Books and articles in professional journals, legislative hearings and reports, and the reports of special committees and institutes are all evidence.[124]

The sound requirement of neutrality extends to constitutional and statutory interpretation as well as common law adjudication. The principle of neutrality demands that judges who are intentionally shielded from the pressures of interest groups by the structure of American government should not justify their rulings by accepting the demands of one interest group at the expense of another not party to the litigation.[125] Herbert Wechsler bore the brunt of much criticism, which I think was unfounded and undeserved, for his 1959 Holmes lecture at Harvard, *Toward Neutral*

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[122]O.W. Holmes, The Common Law 31-32 (Howe ed. 1963) (1881).
[123]Wellington, *supra* note 107, at 236.
[124]*Id.* at 236-37.
[125]*Id.* at 238.

Principles of Constitutional Law.[126] Commenting in 1975 on the criticism, he reasserted the importance of the principle of neutrality,[127] the major components of which have recently been summarized:

> Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the opinion justifying the decision should contain a full statement of those principles.[128]

This, I suggest, is the jurisprudential equivalent of Immanuel Kant's categorical imperative: "Act as if the maxim of your action were to become through your will a universal law of nature."[129]

The essence of neutrality is the quality of evenhandedness, a recognition that whatever influence special interests may have in legislative decisionmaking, the imposition of special burdens or favors on a particular group has no place in adjudication absent special, principled reasons for doing so. Special interest decisionmaking is for the legislative branch only; statutes are the products of a series of marginal adjustments and compromises among various semi-independent groups.[130] Politics is the art of the possible while legislation is the art of accommodation. The possible is conditioned by the ballot box; accommodation can only compensate the "innocent." The judiciary is not as restrained by or susceptible to the interests of the electorate, nor does it have available to it the legislature's largesse.[131] Judges as well as legislators can learn what is widely regarded as being desirable by identifying, isolating, and then weighing the same factors legislators would take into account. But because judges can eschew parochial and partisan factors, they are theoretically and actually able to make a decision on a relatively neutral basis of principles and rights.

Assuming the essential element of neutrality, we now must turn to a broader canvass of the relevant factors relating to policy declaration. How is the judge to ascertain the public interest, and the policies that

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[126]Wechsler, *supra* note 108.

[127]The central thought is surely that the principle once formulated must be tested by the adequacy of its derivation from its sources and its implications with respect to other situations that the principle, if evenly applied, will comprehend. Unless those implications are acceptable the principle surely must be reformulated or withdrawn.

H. Wechsler, Remarks at Federal Appellate Judges' Conference, Federal Judicial Center, Washington D.C. (March 12, 1975), *reprinted in* R. ALDISERT, THE JUDICIAL PROCESS 543 (1976).

[128]Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 990 (1978).

[129]I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 89 (Paton trans. 1964) (1785).

[130]*See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29 (1966).

[131]Wellington, *supra* note 107, at 241.

will advance it? Dean Eugene V. Rostow has addressed this problem as a search for the "common morality of society."[132] Wolfgang Friedmann believed it necessary to identify the collective judgment in terms of basic norms of the community's common life. He suggested that a primary source of information would be the general state of contemporary legislative policy, but the judge should also turn to the state of organization in the society in which he lives, make note of the groupings and pulls of the major social forces of his society, be aware of society's pluralistic aspects, and recognize the state of modern science.[133]

H.L.A. Hart also discussed the importance of ascertaining the conventional morality of an actual social group, referring to "standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives."[134] Perhaps this is the most critical aspect of our inquiry. The judge must screen out personal bias, passion, and prejudice, and attempt always to distinguish between a personal cultivated taste and general notions of moral obligation. These standards of conduct reflect an obligation to respect rules of society. They are, in Hart's formulation, primary rules of obligation because of "the serious social pressure by which they are supported, and by the considerable sacrifice of individual interest or inclination which compliance with them involves."[135] Wellington said that the way in which one learns about the conventional morality of society "is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play."[136]

The line of inquiry proposed by Rostow, Friedman, Hart, and others is similar to that proposed by Wellington to determine what is "socially desirable" for common law adjudication.[137] Yet the attempt to base a decision on social consensus is fraught with peril and, in the interpretation of constitutional precepts, may be inappropriate.[138] A classic example

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[132]Rostow described this common morality as

> a blend of custom and conviction, of reason and feeling, of experience and prejudice. . . . in the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behavior properly count for much . . . . All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society.

Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174, 197.

[133]Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 843-45 (1961).

[134]H.L.A. HART, *supra* note 48, at 165.

[135]*Id.*

[136]Wellington, *supra* note 107, at 246.

[137]*See supra* notes 123-24 and accompanying text.

[138]Louis Jaffe once inquired:

> How does one isolate and discover a consensus on a question so abstruse as a fundamental right? The public may value a right and yet not believe it to be fundamental. The public may hold that the rights of parents are fundamental and yet have no view whether they include sending a child to a private school.

of judges mistaking the public consensus is the position perennially espoused by Justices William J. Brennan, Jr., and Thurgood Marshall in the death penalty cases. Their concurring opinions in *Furman v. Georgia*[139] argued that the death penalty was unconstitutional "cruel and unusual punishment" because it was out of step with contemporary community values.[140] Yet the rush of state legislatures to impose the death penalty since their 1972 statements shows a clarity of community reaction completely opposite to their statements.[141] The judge's tendency to find society's values in his own is a constant danger. Much adjudication in the federal courts, especially in constitutional interpretations based on concepts of public policy, moral standards, and public welfare is little more than a conscious or unconscious imposition of a judge's personal values. Many of us who purport to be objective in identifying community values, and sincerely so, are actually intent on attaining immediate social ends that we conceive as personal moral imperatives.

To some extent, adherence to the principle of neutrality in judicial decisionmaking provides a check against the temptation to substitute personal for social values.[142] Similarly, a consideration of those first principles of legal philosophy may place a particular issue of public concern in a broader, more principled context and may force us to recognize any inconsistencies between our intuitive moral values and the more general philosophy of law to which we may subscribe.[143]

> There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it. In such a situation might we not say that the judge will be free to follow either the traditional ideal or the existing practice, depending upon the reaction of his own conscience? And in many cases will it not be true that there has been no general thinking on the issue?

Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967).

[139]Furman v. Georgia, 408 U.S. 238 (1972).

[140]*Id.* at 295-300 (Brennan, J., concurring); *id.* at 360-69 (Marshall, J., concurring).

[141]Moreover, a Gallup Poll taken in November 1985 disclosed that three out of four Americans favored the death penalty, seventeen percent opposed it, and eight percent were undecided. N.Y. Times, Nov. 28, 1985, at 20, col. 3.

[142]Professor Kent Greenawalt has observed:

> Serious moral choices typically involve some conflict between an action that would serve one's narrow self-interest and an action that would satisfy responsibilities toward others. The dangers of bias are extreme; either we value too highly our own interest or over-compensate and undervalue it. The discipline of imagining similar situations in which we are not involved or play a different role more nearly enables us to place appropriate values on competing considerations.

Greenawalt, *supra* note 128, at 997.

[143]The search for general principles can also affect our judgment in another way. We may discover that some of our intuitive moral views are not consistent with other intuitive views or with generalized principles to which we subscribe. As we test our intuitive reactions to particular situations against our accepted principles, both may give a little, until we arrive at what John Rawls calls a "reflective equilibrium," in which our sense of right for particular issues matches our principles.

Id.

The threshold at which judges are willing to act in disregard or contravention of prevailing social norms, the extent to which they are willing to confront the "antimajoritarian difficulty,"[144] is an important component of their jurisprudential temperament. In those instances in which social consensus is asserted as an appropriate basis for judicial declarations of public policy, how should a judge reconcile what Lon Fuller called the "inner voice of conscience"[145] with prevailing community standards?

In seeking an answer, I first distinguish between circumstances where there is a consensus and where there is not. We should agree that free societies will change because it is their nature to do so. New ideas can gather strength in the social or intellectual "marketplace" and can become the consensus. When these ideas are admitted and so absorbed, the legal system should expand to hold them. Conversely, the legal system should contract to squeeze out old policies that have lost the consensus they once obtained. The expansion or contraction by the legal system to accomplish this goal is what we call judicially-declared public policy. So perceived, social consensus demands sympathy from the court. Where the legislature has not acted and seemingly does not so intend to act, the courts not only have the authority, but possibly the duty, to keep pace with the change in consensus. Often this judicial action is necessary because the executive or legislative leadership has shirked its responsibility.

This does not mean, however, that the judge must act only when public opinion discloses a majoritarian viewpoint, even a substantial one. Had the Supreme Court waited for public consensus we never would have had *Brown v. Board of Education*;[146] there was no national consensus for the compulsory integration of the public school system in 1954.

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[144]Professor Laurence Tribe contends this problem is inherent in constitutional government:

> Whether imposed by unelected judges or by elected officials conscientious and daring enough to defy popular will in order to do what they believe the Constitution requires, choices to ignore the majority's inclinations in the name of a higher source of law invariably raise questions of legitimacy in a nation that traces power to the people's will. . . . In its most basic form, the question in such cases is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change. Since that question would arise, albeit less dramatically, even without the institution of judicial review, its answer must be sought at a level more fundamental than is customary in discussions of why judges, appointed for life, should wield great power. For even without such judges, it must be stressed, lawmakers and administrators sworn to uphold the Constitution must from time to time ask themselves, if they take their oath seriously, why its message should be heeded over the voices of their constituents.

L. TRIBE, CONSTITUTIONAL LAW 9-10 (1978).

[145]Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 635 (1958).

[146]349 U.S. 294 (1955).

There are times that call for judicial intervention or, more properly, judicial operation, in advance of the consensus. Hence, the judge may properly outrun the consensus. But, in doing so, he must tread more delicately. He must, first and foremost, convey the distinct impression and appearance of impartiality. Second, the judge must in fact be impartial and independent in both the decisionmaking process and the process of justification. Third, the judge must fulfill the obligations of neutrality and what may be called both justice *in rem*, a social desirability that is based on some preeminent moral principle, and also justice *in personam*, justice between the parties to the suit. Fourth, the first principle of the reasoning process that starts the march to the specific conclusion (or declaration of public policy) must be a concept universally held and uniformly respected. The first principle must be related to at least one of what I have previously described as supereminent principles of the law: creating and protecting property interests; creating and protecting liberty interests; fulfilling promises; redressing losses caused by breach or fault; or punishing those who wrong the public.[147] Finally, all the relevant private, social, public, and governmental interests must be identified and evaluated. They must be variously compared, evaluated, accepted, rejected, tailored, adjusted, and, if necessary, subjected to judicial compromise.

IV. Constitutional Law Interpretation

Closely associated with the lawmaking function of the courts, and concededly a primary basis of criticism of the federal courts, is the use of constitutional interpretation to alter social and political, as well as juridical, customs and traditions. Our remarkable Constitution is unique. British Prime Minister William Gladstone described our Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."[148] Yet the Constitution is a "most wonderful work" because it is more a moral statement than a set of positive law norms, more a declaration of rights than a set of by-laws for society. The United States Constitution sets forth a frame of government that the courts must interpret constantly to accommodate the changes in community moral standards. The Constitution descends from the Magna Carta and the English Declaration and Bill of Rights of 1688 and 1689, and contains certain fundamental principles of right and justice. These principles are entitled to prevail of their own intrinsic excellence, regardless of the interpretations of those who dominate government at any particular period and regardless of those who wield the physical resources of the community.[149]

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[147]*See supra* note 32 and accompanying text.

[148]*Quoted in* J. Lieberman, Milestones! 25 (1976).

[149]*See* E. Corwin, The "Higher Law" Background of American Constitutional Law 4 (1976).

A. John Marshall

Interpretations by prominent legal philosophers on the bench have charted the course of this nation. Among these was John Marshall, who came to the Supreme Court not only at the right time, but whose long tenure justifies his paramount place in our history. If Marshall had proclaimed only the decision in *Marbury v. Madison*,[150] he still would be remembered. Marshall, however, wrote for the Court in *Fletcher v. Peck*,[151] *Dartmouth College v. Woodward*,[152] *McCulloch v. Maryland*,[153] *Cohens v. Virginia*,[154] *Gibbons v. Ogden*,[155] and *Osborn v. Bank of the United States*.[156] Jethro K. Lieberman succinctly has described the leadership of Marshall in these cases: "These seven decisions made the Union that the Civil War preserved. It was a breathtaking, prodigious achievement. The majestic sweep of his opinions gave flesh and blood to the Constitutional skeleton."[157]

B. The Warren Court

Marshall steered toward one goal—his grand vision for a unified, federalized nation. His domination of the Court was perhaps matched by only one other influence in our judicial history—the justices of the Warren Court with their grand vision for an egalitarian society.[158] *Brown v. Board of Education*[159] was the overture, trumpeting stirring notes of the Warren Court's theme for this country. Recognizing that the theme would first produce massive discord, and realizing that the *Brown* decision could not be immediately enforced, a year after the initial decision, the Court announced the "with all deliberate speed" formula.[160]

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[150]5 U.S. (1 Cranch) 137 (1803).

[151]10 U.S. (6 Cranch) 87 (1810). The Court held that the Georgia legislature could not revoke a land grant, even if fraud were involved, because that revocation would violate the contracts clause of the Constitution.

[152]17 U.S. (4 Wheat.) 518 (1819). An act of the New Hampshire legislature altering the charter of Dartmouth College, without the consent of the college, unconstitutionally impaired the obligation of the charter.

[153]17 U.S. (4 Wheat.) 316 (1819). Pursuant to the supremacy clause, the Court prohibited Maryland from taxing a duly authorized branch of the Bank of the United States.

[154]19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, the Court discussed the reach of its appellate jurisdiction and held that it had jurisdiction over the question of whether a state could ignore an act of Congress if the act was repugnant to state law.

[155]22 U.S. (9 Wheat.) 1 (1824). The Court held that the act of the New York legislature granting to Robert Fulton the exclusive navigation of all waters within the state was repugnant to the commerce clause.

[156]22 U.S. (9 Wheat.) 738 (1824). The Court held that federal circuit courts had jurisdiction of suits by and against the Bank and could prevent states from infringing on the operation of the Bank through the passage of laws prohibited by the supremacy clause.

[157]J. LIEBERMAN, *supra* note 148, at 61.

[158]*See* Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

[159]347 U.S. 483 (1954).

[160]Brown v. Board of Education, 349 U.S. 294, 301 (1955).

Shortly, a full orchestration of our society set in: the Court outlawed bible reading and all other religious activities in public schools;[161] ordered reapportionment of the House of Representatives, of both houses of state legislatures, and of local governments on a one-man, one-vote basis;[162] reformed numerous aspects of state and federal criminal procedure, extensively enhancing the rights of the accused, including juvenile offenders;[163] made wire-tapping and eavesdropping subject to the fourth amendment's prohibition against unreasonable searches and seizures, and held that evidence obtained in violation of that prohibition may not be admitted in state or federal trials;[164] and laid down a comprehensive set of rules governing the admissibility of confessions and the conduct of police toward persons arrested.[165] The Warren Court greatly expanded the concept of state action under the fourteenth amendment, thus enabling the federal courts and Congress to reach out and prohibit private discriminations.[166] The Court also limited the power of state and federal governments to forbid the use of birth-control devices;[167] to restrict travel;[168] to expatriate naturalized or native-born citizens;[169] to deny employment to persons whose associations were deemed subversive;[170] and to apply the laws of defamation.[171] Egalitarianism was the watchword and accompanying themes enlarged the dominion of law and centralized

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[161]*See, e.g.*, District of Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[162]*See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[163]*See, e.g.*, Bloom v. Illinois, 391 U.S. 194 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968); Mempa v. Rhay, 389 U.S. 128 (1967); *In re* Gault, 387 U.S. 1 (1967); Anders v. California, 386 U.S. 738 (1967); Sheppard v. Maxwell, 384 U.S. 333 (1966); Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Brady v. Maryland, 373 U.S. 83 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[164]Lee v. Florida, 392 U.S. 378 (1968); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).

[165]Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966).

[166]*See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966).

[167]Griswold v. Connecticut, 381 U.S. 479 (1965).

[168]Aptheker v. Secretary of State, 378 U.S. 500 (1964). *But cf.* Zemel v. Rusk, 381 U.S. 1 (1965).

[169]*See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964).

[170]*See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).

[171]*See, e.g.*, St. Amant v. Thompson, 390 U.S. 727 (1968); Eckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

the law-giving function in national institutions, including the federal courts.

Notwithstanding the great progress made under the equal protection and due process clauses, the country paid a price. In the minds of many people, the federal courts represented the ultimate relief from every social, political, or economic ill. Heightened expectations became commonplace and still are present today. These expectations are chiefly responsible for the litigation explosion in the federal courts and are the source of great disappointment to many in our society who rap at our courthouse doors and often leave in dejected spirits because they do not quite understand that many limitations on our activity exist. Three quarters of a century ago, Roscoe Pound sounded a warning:

> [W]hen men demand much of law, when they seek to devolve upon it the entire burden of social control, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties. . . . The purposes of the legal order are [then] not all upon the surface and it may be that many whose nature is by no means anti-social are out of accord with some or many of these purposes. . . . [It is then that] we begin to hear complaint that laws are not enforced and the forgotten problem of the limitations upon effective legal action once more becomes acute.[172]

C. Universal Principles

Constitutional interpretation draws essentially on universal principles. At times there appears to be a clash between two sets of ethics—denominated by Max Weber as an ethics of responsibility and an ethics of conscience. Weber stated that the ethics of responsibility require accepting unpleasant truths, the limits of knowledge and of human nature, the costs of actions, and sometimes the cost of refusing to take action. The ethics of conscience require reminding humankind of its moral duty to live up to its highest potentiality and restrain from acting solely out of expedient or base motives.[173] Clearly, those societies function best in which the practitioners of the ethics of responsibility and of conscience are at least well-matched.[174]

At other times, the collision occurs in the disagreement over interpreting the Constitution as a moral statement. The Benthamites exalt the goal of morality by maximizing pleasure and minimizing pain, thereby conferring a benefit on society. They advocate pleasure and pain as the common denominator of all morally relevant experiences. Even the Benthamites will disagree among themselves, however, as to what constitutes

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[172]Pound, *Address Before the Pennsylvania Bar Association*, 22 PA. BAR ASS'N REP. 221 (1916).

[173]M. WEBER, ON LAW IN ECONOMY AND SOCIETY (Rheinstein ed. 1954) (2d ed. 1925).

[174]*See* Epstein, *True Virtue*, N.Y. Times, Nov. 24, 1985, § 6 (Magazine), at 96.

pleasure and pain. Our sordid history in race relations attests to that disagreement. What is deemed a long-awaited benefit to the blacks may come with great pain to the multitude of red-necks.

Beyond intramural skirmishes among the utilitarians is the rights theorists' approach to the moral values contained in the Constitution. The rights theorists argue that life is more than pleasure, happiness, and the avoidance of pain. The right to liberty, for example, is paramount. According to this view, the benefit of liberty has priority over all material benefits. The ever-present dilemma is to determine what things are benefits and how much divergence exists after we identify these things. When it comes to public affairs, Rawls argued that considerations of liberty must be "prior in lexical ordering" to conditions of social welfare.[175] I think this means that no matter how abundant and equitable the distribution of material comforts may be, the most extensive liberty that is possible for all members of society cannot be overridden. The problem that emerges is obvious. Is this philosophy shared by those members of society presently deprived of material, as distinguished from theoretical, benefits, and thus deprived of decent food, shelter, health care, and job opportunities? If these persons had their druthers, would they reject all these creature comforts for abstract freedoms of speech, assembly, and religion, and other tangible aspects of liberty? As I inquired earlier,[176] are these strictly middle class values, or are they universally shared? In this context, the clash between adherents to the benefit and rights theories, rather than the simplistic labels of "liberal," "conservative," or "moderate," characterizes much of our present constitutional law litigation.

Perhaps more obvious are the strident clangs in criminal procedure that loudly broadcast divergent philosophies on how to balance properly the interests set forth in the Bill of Rights. Herbert Packer suggested that judges appear to adopt one of two theoretical positions. Packer called the first position the "crime control" model.[177] The goal of this model is to streamline the arrest and processing of offenders so that crime is deterred through efficient enforcement. The second category, the "due process" model,[178] places special emphasis on the need to control governmental interference in individuals' lives. This model posits that abuse is frequent in law enforcement, thus necessitating tight guidelines regulating the use of confessions and the conduct of searches and arrests, providing for the availability of counsel, and protecting against self-incrimination. Certainly, the so-called "conservatives" seem to adhere to the "crime control" model, and the "liberals" to the "due process" model.

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[175]J. Rawls, *supra* note 1, at 40-45, 60-65.

[176]*See supra* notes 26-27 and accompanying text.

[177]H. Packer, The Limits of the Criminal Sanction 153-73 (1968).

[178]*Id.* at 153-58, 163-73.

Recourse to universal principles inclines a judge's decision one way or another, depending upon the jurisprudential temperament of the judge, but this recourse cannot demean the importance of precedents. Judges always use precedents in the publicly stated reasoned elaboration set forth to justify their constitutional decisions. The reliance on precedent is a process that is as delicate as it is fraught with responsibility, because in recent years settled disciplines of state law have been superseded by newly fashioned constitutional precepts. This paradigm of judicial creativity churns out new jurisprudence in which the temperament of the judge draws upon a subjective legal philosophy to declare what the law ought to be. If I were to attempt to generalize, I should say that the major question in the controversial constitutional law cases is not new. It is that posed by Heraclitus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."[179]

D. Public Opinion

At any given time a body of beliefs exists, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of an era, or what may be called the reigning or predominating current of opinion. Sir Robert Peel was more cynical than accurate in 1820 when he described public opinion as "the tone of England—of that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs . . . ."[180] As the public has opinions and beliefs, so do judges. Moreover, the whole body of beliefs existing at any given time generally may be traced to certain fundamental assumptions that, whether they are true or false, are believed by judges (and the public) to be true with such confidence that these beliefs hardly appear to bear the character of assumptions.

These currents that influence both court decisions and legislation acquire their force and volume only by degrees, and are in their turn liable to be checked or superseded by other and adverse currents, which themselves gain strength only after a lapse of time. We, however, cannot talk of a prevalent belief or opinion as "being in the air" or "brooding in the sky." Rarely does a widespread conviction spring up spontaneously among the multitude. John Stuart Mill was absolutely right, I think, when he said: "The initiation of all wise and noble things, comes and must come, from individuals; generally at first from some one individual."[181] The discoverer of the new conception, or some follower who has embraced it with enthusiasm, preaches it to his friends or disciples, often in a classroom, or expresses it either in a professional or popular journal, and they who hear and read become impressed with its im-

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[179]Aldisert, *supra* note 32, at 771.

[180]*Quoted in* A.V. Dicey, Law and Public Opinion in England 20 n.1 (1985).

[181]J.S. Mill, On Liberty 119 (1849).

portance and its truth, and gradually a whole new school accepts a new creed. When the apostles are either persons endowed with special ability or, what is quite as likely, are persons who are deemed free of a bias, whether moral or intellectual, they loom in fashioning public opinion and influencing judicial decisions. We have seen this phenomenon in many branches of substantive law—Williston influencing contract law, Prosser with torts, Beale and later Reese and Leflar formulating conflicts of law theories, and Wright, Wechsler, and Hart developing procedures and court jurisdiction concepts, to name but a few.

When constitutional law is involved, this phenomenon assumes *a fortiori* proportions. An entire school of constitutional law philosophy that has emerged essentially from articles published in the Ivy League law reviews and books has settled successfully in federal court opinions.[182] Whatever we may do in cases involving other legal disciplines, when it comes to constitutional law, I do not think we follow the approach Judge Joseph C. Hutcheson, Jr. once refreshingly described:

> I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[183]

Nor do we follow the example of Rabelais' famed Judge Bridlegoose:

> [H]aving well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparatories, productions, evidences, proofs, allegations, depositions, cross, speeches, contradictions . . . and other such confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my closet all the pokes and bags of the defendant—that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff [and then I roll the dice,] little small dice [when

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[182]See this influence as reflected in citations of the works of Alexander Bickel in Anderson v. Celebrezze, 460 U.S. 780, 790 n.11, 805 (1983) and New York v. Ferber, 458 U.S. 747, 768 n.22 (1982); John Hart Ely in City of Cleburne v. Cleburne Living Center, Inc., 105 S. Ct. 3249, 3256 n.10 (1985) and American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985); Yale Kamisar in United States v. Leon, 468 U.S. 897, 916 n.14 (1984) and Gerstein v. Pugh, 430 U.S. 103, 119 (1975); Laurence Tribe in Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627 n.5 (1984) and Washington v. General Motors Corp., 406 U.S. 109, 112 (1972); and Herbert Wechsler in Franchise Tax Bd. v. Construction Laborers Trust for S. Cal., 463 U.S. 1, 9 (1983) and Lemon v. Kurtzman, 411 U.S. 192, 207 (1973).

[183]Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

> there are many bags and] other large, great dice, fair and goodly ones [when there are fewer bags.][184]

On the contrary, I believe that with decisionmaking in constitutional law every rule of conduct must, whether or not the judge perceives the fact, rest on some general universal principle; some moral principle, personally and subjectively held by the judge; some conception of proper community moral standards, if you will, about which he feels strongly enough to reduce that conception to constitutional efficacy. It is more often than not a phenomenon of "Have opinion, need case."

E. "Federal Courtization" of Society

At times new waves of belief or opinion drown the substantive law previously established by court decision or by the legislature, in most cases the state legislature, but occasionally Congress. In the process, the jurisprudence, whether termed positive or substantive law, is replaced with newly-minted constitutional dogma. This process properly can be called the modern "federal courtization" or the "constitutionalization" of our society. A case can be made that the extent to which this federalization occurs varies proportionately with the judges' personal beliefs or opinions relating to the trust or distrust of the public, of state and federal officials, and state and federal legislators. Implicated here are several interrelated universal principles of political science and general philosophy.

The most primitive of these principles, and perhaps the most anchored in the political science bedrock, is the centuries-old clash between the Hamiltonian and Jeffersonian views of democracy. Thomas Jefferson unquestionably lost this battle in the federal courts in the past fifty, if not one hundred, years. With one major exception, the trend has been toward federal domination over states' rights either by determinations that Congress has pre-empted a field of activity through the commerce clause[185] or, more recently, by reliance on section five of the fourteenth amendment,[186] or by determinations that particular state action somehow violates the Constitution.[187] The sop to states' rights occurred in 1938 with *Erie Railroad Co. v. Tompkins*,[188] in which the Supreme Court declared that state law should control in diversity cases.

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[184]*Id.* at 277-78 (footnote omitted) (quoting 2 F. RABELAIS, GARGANTUA AND PANTAGRUEL 39-40 (Everyman's ed. 1929) (1532)).

[185]*See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (mud flaps cases).

[186]See the paradigmatic case of Katzenbach v. Morgan, 384 U.S. 641 (1966).

[187]*See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (commerce clause); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (privileges and immunities clause); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (due process clause; fourth amendment); Wolf v. Colorado, 338 U.S. 25 (1948) (due process clause); Shelley v. Kraemer, 334 U.S. 1 (1948) (equal protection clause).

[188]304 U.S. 64 (1938).

I find in many of us the "philosopher king" syndrome to which Learned Hand once made reference.[189] A philosopher king is akin to what Joseph Epstein recently described as a "virtucrat": "The virtucrat is certain he has virtue on his side. The virtue being laid claim to is public virtue; it is the virtue that comes from the certainty that one's own opinions are the only correct opinions. The virtucrat is a prig, but a prig in the realm of opinion."[190] I find this attitude somewhat pervasive among federal judges and content myself with only reporting its existence without either endorsing it or disapproving it. Yet we must recall what the distinguished political scientist, Robert Dahl, has said: "After twenty-five centuries, almost the only people who seem to be convinced of the advantage of being ruled by philosopher-kings are . . . a few philosophers."[191] Yet the philosopher-king mentality has an extremely respectable pedigree. For example, we can trace the mentality to Plato, who taught that in the state three classes are distinguished: that of the wise, destined to dominate; that of the warriors, who must defend the social order; and that of the artisans and farmers, who must feed society.[192] I hasten to add that most federal judges do not consider themselves warriors, artisans, or farmers. In ancient times, in the Orient, the supreme object of intellectual activity was religion; in Greece, it was philosophy; and in Rome, it was law. Federal judges seem to be more philosophers than lawyers, to use a kind expression; more autocrats of the intellect, to be unkind. Some examples of this tendency follow.

F. Distrust of State Institutions

Reflected in the opinions of certain federal judges, I see a philosophy of hauteur, if not deep distrust of state law, state courts, state government, and state and locally elected officials. In discussing the Burger Court in 1978, John Hart Ely commented:

> The current Court's constitutional jurisprudence is . . . not content with limiting its intervention to disputes with respect to which there exist special reasons for supposing that elected officials cannot be trusted—those involving the constriction of the political process or the victimization of politically defenseless minorities. Instead, it importantly involves the Court in the merits of the policy or ethical judgment sought to be overturned, measuring those merits against some set of "fundamental" value judgments. This is not by any means an orientation original to the Burger Court. It plainly marked the work of the Court that decided *Lochner v. New York* and its 200-case progeny.[193]

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[189]L. HAND, THE BILL OF RIGHTS 73-74 (1958).

[190]Epstein, *supra* note 174, at 90.

[191]R. DAHL, DEMOCRACY IN THE UNITED STATES 24 (3d ed. 1967).

[192]PLATO, THE REPUBLIC, Bk. III.

[193]Ely, *supra* note 31, at 15 (footnote omitted).

I neither endorse nor inveigh against this concept of political science. I state only that this attitude of personal-concepts-of-ethics-equals-constitutional-law not only does exist, but is extremely alive and flourishing.

This is a classic example of the nonapplicability of the labels "liberal" and "conservative." As a result, although the federal courts are charged with the evolution and application of society's fundamental principles, the major problem is to decide what elevates a garden variety, run-of-the-mill value or principle to the exalted status of "fundamental." Ely suggested, and I agree completely, that although the judge or commentator in question may be talking in terms of some "objective," nonpersonal method of identification, what he is likely really to be "discovering," whether or not he is fully aware of it, are his own values.[194] In any event, I do not think you can be a true liberal or populist, in the traditional political sense, and decry the presence of politics in the basic schema of the republic. Traditionally, the call of the liberal has been "The people, yes!" Yet under the guise of the first amendment, some judges seem hell-bent on taking politics out of politics.

For example, in *Elrod v. Burns*,[195] the Court found to be taboo the 200-year-old practice of firing by the victorious party those political supporters of the losers. Society long has recognized that patronage in employment played a significant role in democratizing American politics and that before such practice fully developed, an "aristocratic" class dominated political affairs, a tendency that persisted in areas where patronage did not become prevalent.[196] Yet notwithstanding Holmes' admonition that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it,"[197] certain judges obviously adhered to the philosophy that the lifeblood of political party strength is very tainted and that the first amendment will cleanse it all. The Chief Justice of the West Virginia Supreme Court has commented:

> In elected politics, the legislature and executive take idealistic, energetic, ambitious young men and turn them into whores in five years; the judiciary takes good, old, tired, experienced whores and turns them into virgins in five years. The men are not the source of either transformation—they are of the same type, particularly since judges are either graduates or rejects of politics. The decisive factor is the institution—whether the exact same creatures are quartered in the local house of ill fame or in the Temple of the Vestal Virgins.[198]

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[194]*Id.* at 16.

[195]427 U.S. 347 (1976).

[196]*See* authorities cited in Elrod v. Burns, 427 U.S. 347, 378-79 (1976) (Powell, J., dissenting).

[197]Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[198]R. NEELY, *supra* note 26, at 190.

As a result, the philosophy "To the victor belongs the spoils" has given way to "If you are independently wealthy or can muscle enough Political Action Committee money to buy TV time and street workers, you, too, can be the victor."

I think that the same philosophy, to a reduced extent, underlies the demise of the law of defamation as to public persons. The Court discarded more than 200 years of protecting either a property or a liberty interest, as the case may be, in one's reputation in *New York Times v. Sullivan*.[199] The formidable scholarship that underlies these two landmark cases was not drawn from orthodox American jurisprudence. The decisions emerged from first principles of philosophical universality as expressed in personal values.

Similarly, the demeaning of state legal remedies caused by an expansive stretch of constitutional dogma in cases brought under 42 U.S.C. § 1983 has occurred. The Court has elevated the traditional tort concepts of assault and battery and at least gross, if not ordinary, negligence to a constitutional dimension when state action is found. Notwithstanding that many of such cases ordinarily would have been brought in state small claims courts, they now are elevated to the exalted level of "federal cases" and enjoy the full panoply of judge, jury, and ceremony instead of the more traditional atmosphere of television's "The People's Court."

In addition to a lack of confidence in state remedies, some judges have expressed a kindred philosophy in a stated distrust of state courts. In *Stone v. Powell*,[200] the majority enunciated the following philosophy:

> The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.[201]

One of the dissents expressed a universal principle diametrically opposed: "State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences. . . ."[202] Which represents the

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[199]376 U.S. 254 (1964).
[200]428 U.S. 465 (1976).
[201]*Id.* at 493-94 n.5.
[202]*Id.* at 525 (Brennan, J., dissenting).

"liberal" view and which the "conservative?" Would a populist devotee, generally considered a liberal, argue against adjudication by judges who are popularly elected?

G. Civil Law/Criminal Law Dichotomy

Yet the personal beliefs and opinions of individual judges reflect an intricacy much more sophisticated than a mere distrust of states. It is more than a simple antipathy toward, to use the pejorative, "states' rights." It goes further than a preference for individual rights as against the state. The problem is much more complex. Over the years in my own court, I have seen judges who will stretch the fourteenth amendment to its outer limits in order to grant relief to a plaintiff in a civil action against state officials. I find in these colleagues an antipathy toward the school boards, university and college administrators, hospital superintendents, wardens, governors, mayors, and other local, county, and state officials. I use the word "antipathy" purposely because in many cases these judges do not evaluate the case on the basis that the plaintiff has met his burden; they proceed to decide in favor of the individual against the social order on little more than a prima facie case. These judges are willing to "constitutionalize" the most mundane aspect of government administration simply because they disagree with the administrative action taken by the official. Often, in essence, these judges merely disagree with the exercise of broad administrative discretion. The disagreement should not be the test for a fourteenth amendment violation, yet the annotations to 42 U.S.C. § 1983 show hundreds of cases where this has occurred. These civil cases are examples of the judges' jurisprudential temperaments disclosing a highly developed Platonic complex.[203]

Yet some of these same judges hold different philosophical beliefs and opinions in criminal cases involving the interaction between the fourteenth amendment and the defendant. These judges who insist that government officials dot every *i* and cross every *t* in the civil administration of justice do not seem to hold police, district attorneys, government prosecutors, and trial judges to the same exacting standards in criminal cases. Perhaps the reasons can be found in the background and experience of federal judges. Many previously served as government prosecutors. Many emerge from law firms that never have represented defendants in criminal cases. Many are very concerned about crime in the streets (often the sidewalks and streets surrounding a federal courthouse located in a metropolitan area are not safe after nightfall). Whatever the reasons, many judicial "libertarians" in civil cases are to the far right of old Justice McReynolds in criminal cases. This, of course, is another reason why simplistic labels of "liberal" or "conservative" should not be attached to federal judges.

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[203] *See supra* notes 189-92 and accompanying text.

V. Statutory Construction

Were I to identify one single phenomenon to illustrate the distinction between the contemporary judicial process and the process that Cardozo described over a half century ago,[204] the phenomenon would be that statutes have replaced case law as the major source of the American legal precept. Somewhat paradoxically, as the courts have enlarged their lawmaking roles, so too have the legislatures enacted laws vesting the courts with greater responsibilities. At times the growth in statutory law—individual statutes as well as comprehensive codes—has seemed exponential. Simultaneously, the courts must interpret volumes of exasperatingly detailed regulations promulgated by the executive branch. And where the legislature or the executive has not acted, prestigious private organizations such as the American Bar Association and the American Law Institute have proposed voluminous codes of substantive and procedural law.[205] Although not possessing the sanctions of positive law, these codes have exerted a potent, often persuasive, effect on the state and federal judiciaries.

This proliferation of state and federal statutes has increased the burdens on the judiciary. Not all statutes contain the specificity of the Internal Revenue Code. Much statutory language is obscure, which is in part traceable to the requirement that statutes speak in general terms, but which more often seems to be the result of legislative inability to reach meaningful compromises on detailed subjects. Frequently, for political reasons, the legislature abdicates the responsibility for making law to the courts.[206] The general vagueness of many statutes and the wide

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[204]B. Cardozo, *supra* note 34.

[205]*See, e.g.*, ABA Standards for Criminal Justice (2d ed. 1986) (includes chapters on: Appellate Review of Sentences; Criminal Appeals; The Defense Function; Discovery & Procedure Before Trial; Electronic Surveillance; Fair Trial & Free Press; Joinder & Severance; Pleas of Guilty: Postconviction Remedies; Pretrial Release; The Prosecution Function; Providing Defense Services; Sentencing Alternatives & Procedures: Special Functions of the Trial Judge; Trial by Jury; and The Urban Police Function). *See also* Restatements of Agency; Conflicts of Law; Contracts; Foreign Relations; Judgments; Property; Restitution; Security; Torts; and Trusts. *See also* Federal Securities Code (1978); Model Land Development Code (1975); Model Code of Pre-Arraignment Procedure (1975); Model Penal Code (1962).

[206]*See* C. McGowan, Congress and the Courts 8-9 (1976) (University of Chicago Law School monograph of address given by Judge McGowan at University of Chicago Law School Annual Dinner, Apr. 17, 1975):

> The pattern taking shape appears to be that of a Congress intent upon bringing federal power to bear in an ever-widening range of human affairs, but having no better answer for the monitoring, supervision, and enforcement of that power than the employment of the federal courts to these ends. That is conceivably one way to govern the country, and perhaps we of the federal courts should be flattered by this seeming mark of confidence in our capacities. I suggest, however, that it was not in this way, or such heavy involvement in tasks of this nature, that the federal courts achieved such prestige and popular

scope allowed for their interpretation encourages an arbitrariness in reaching decisions that only an allegiance to justice can allay.

A statute is basically a legal precept, the law's statement of a standard of conduct. In Roscoe Pound's formulation, legal precepts compose "the body of authoritative materials, and the authoritative gradation of the materials, wherein judges are to find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order."[207] Whether legal precepts emerge as by-products of court decisions or constitute deliberate products of the legislature, the courts should accord both types of precepts identical or similar treatment, whenever possible, in the twin processes of reaching and justifying a judicial decision.

A. Three Problems of Statutory Interpretation

An analysis of interpreting statutory precepts involves three separate problems:

> (1) The problem of language analysis in the strict sense—the presence of an unclear norm;
> (2) the problem of lacunae—of the nonexistent norm; and
> (3) the problem of evolution—of the norm whose meaning changes while its text remains constant, thus bringing into tension the original intent and the ongoing history theories of interpretation.[208]

Although the first problem, the task of analyzing language, receives the most judicial attention, I will address briefly the problem of the norm whose meaning changes. This became the subject of much public controversy when, in 1985, Attorney General Edwin Meese III publicly criticized Supreme Court justices for failing to interpret the Constitution in accordance with the intent of the drafters and instead substituting

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acceptance as they may now enjoy.

. . . .

. . . A recurring phenomenon is for the legislative branch, in addressing itself to major areas of public concern, to finesse hard choices of policy, likely to tie up elected legislators representing differing interests in knots of controversy and resulting inaction. Instead, it makes broad delegations of authority to department heads or newly-created commissions to make those choices in the form of implementing regulations. In order to assure that such regulations are carefully scrutinized for conformity to the dimly ascertainable Congressional intentions, judicial review is provided by reference to variously articulated standards such as arbitrariness, rational basis, or, God help us, substantial evidentiary support in the record.

[207]Pound, *supra* note 16, at 476.

[208]R. Aldisert, Hard Core Judicial Process Problems Facing Judges in the 80's (monograph for Appellate Judges Seminars, 1982).

the judges' idiosyncratic political science and moral philosophies.[209] Justices William J. Brennan, Jr., and John Paul Stevens leaped into public print arguing that judges were not required to rely on the original intent theory insofar as the Constitution was concerned.[210] Attorney General Meese, of course, put his finger on the serious question of how federal judges should determine public policy. Probably he was correct in suggesting that many decisions do not meet the standards of social desirability and neutrality previously discussed in these pages. The justices, however, were surely right in saying that insofar as interpreting the Constitution is concerned, unlike interpreting statutes and contracts, judges are not bound by the original intent theory of adjudication.

Because the Constitution is a moral statement more than a set of by-laws, conditions in the nation that have occurred since its ratification should be extremely relevant to its interpretation. These changing conditions allow federal judges to reject the original intent theory of interpretation and use instead a continuing or ongoing history theory, thus permitting the Constitution to reflect the prevailing temper of the country. In *Furman v. Georgia*,[211] the death penalty case, the various opinions relied on the ongoing history technique to demonstrate that the eighth amendment's proscription of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice,"[212] and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[213] As Holmes reminded us:

> The life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[214]

B. The Unclear Norm

Passing from the problem of the norm whose meaning changes, I turn now to the first problem of statutory construction, the task of analyzing words, phrases, sentences, and paragraphs to ascertain what

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[209]E. Meese, Speech to the American Bar Association (London, July 17, 1985), *reported in* N.Y. Times, July 18, 1985, at 7, col. 1.

[210]W. Brennan, Speech before a Seminar at Georgetown University (Oct. 12, 1985), *reported in* N.Y. Times, Oct. 13, 1985, at 1, col. 1; J. Stevens, Remarks before a Luncheon of the Federal Bar Association (Chicago, Oct. 23, 1985), *reported in* N.Y. Times, Oct. 26, 1985, at 1, col. 1.

[211]408 U.S. 238 (1972).

[212]*Id.* at 242 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)) (Douglas J., concurring).

[213]*Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (Douglas J., concurring).

[214]O.W. Holmes, *supra* note 122, at 1.

is meant by an unclear norm. This approach assumes that Congress intended to address the relevant factual scenario at issue, but did so in unclear language. To interpret ambiguities, judges (and some legislatures) first created "canons of construction" to apply to statutory precepts but not to judicially-created precepts. These canons evidence a methodology of the judicial process peculiarly applicable to statutory precepts. They were devised because statutory law, unlike case law, usually has no accompanying *ratio decidendi* to assist in later interpretations. Yet the problem is that every canon seems to have its antinomy. By 1950, most canons were so enervated by contradictions that Karl Llewellyn's taxonomic treatment deftly eviscerated them for all practical purposes.[215] Today, whenever I encounter the use of a canon even in the opinions of my most distinguished judicial colleagues, I am tempted to smile because Llewellyn has convinced me that for every thrust there is an equally important parry. For every court that says, "A statute cannot go beyond its text," another court may say, "To effect its purpose a statute may be implemented beyond its text." Similarly, we see juxtaposed: "If language is plain and unambiguous it must be given effect" with "not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose;" "Every word and clause must be given effect" with "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage;" and, finally, "Expression of one thing excludes another" with "The language may fairly comprehend many different cases when some only are expressly mentioned by way of example."

By 1899, Holmes lamented that courts did not inquire what the legislature meant but only what the statute meant.[216] He would not voice this complaint today, for although contemporary courts are fond of stating that "[t]he starting point in every case involving the construction of a statute is the language itself,"[217] methodology now abjures a strictly semantic approach. Judges have played with the Mischief Rule of *Heydon's Case*,[218] the Golden Rule,[219] and the Literal Rule.[220] Judges even have dallied with what American jurisprudence has called the "Plain Meaning Rule":

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional

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[215]Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

[216]Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

[217]International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

[218]30 Co. 7a, 76 Eng. Rep. 637 (Ex. 1584).

[219]*See, e.g.*, River Wear Comm'rs v. Adamson, [1876-77] 2 A.C. 743, 764-65.

[220]*See, e.g.*, Vacher & Sons, Ltd. v. London Soc'y of Compositors, [1913] A.C. 107, 121-22 (Lord Atkinson).

> authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.[221]

Impressive authorities have warned judges not to depend too much on the actual language of a statute. Cardozo wrote that "[w]hen things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning."[222] Holmes told us: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[223] Learned Hand said that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[224] Lord Denning likewise has described a transition from 19th century "strict constructionists" to 20th century "intention" seekers: "The strict constructionists go by the letter of the document. The 'intention seekers' go by the purpose or intent of the makers of it."[225]

Today current wisdom requires judges to ascertain the legislative intent,[226] a task somewhat akin to pinpointing the intent of a testator or the intent of disputing parties to a contract. Proper judicial construction, in the modern view, requires recognition and implementation of the underlying legislative purpose; and the judge, the theory holds, must accommodate the societal claims and demands reflected in that purpose.[227] To accomplish this task, as Justice Roger J. Traynor put it,

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[221]Caminetti v. United States, 242 U.S. 470, 485 (1917) (Day, J.) (citations omitted); *see* Hamilton v. Rathbone, 175 U.S. 414, 419-21 (1899) (Brown, J.).

[222]Lowden v. Northwestern Nat'l Bank & Trust Co., 298 U.S. 160, 165 (1936).

[223]Towne v. Eisner, 245 U.S. 418, 425 (1918).

[224]Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

[225]A. DENNING, THE DISCIPLINE OF THE LAW 4 (1979).

[226]*See* Brown v. General Servs. Admin., 425 U.S. 820, 825 (1976) ("Congress simply failed explicitly to describe § 717's [of the Civil Rights Act of 1964] position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways."); United States v. Bornstein, 423 U.S. 303, 309-10 (1976) ("There is no indication that Congress gave any thought to the question . . . . But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.").

[227]*See* Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976); *see also* Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 520-23 (1948); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1316-17 (1975).

we need "literate, not literal" judges,[228] lest a court make a construction within the statute's letter, but beyond its intent.[229]

The difference between the majority and dissenting opinions in the affirmative action case of *United Steelworkers of America v. Weber*[230] graphically demonstrates the clash between the majority's reliance on legislative intent and the dissent's reliance on the statutory language. The relevant statute, 42 U.S.C. § 20003-2(d), provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[231]

The majority reasoned:

> Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation . . . of the Act.
>
> Respondent's argument is not without force. . . . [B]ut respondent's reliance upon a literal construction . . . is misplaced. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." . . . The prohibition against racial discrimination in . . . Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.[232]

The dissent took a diametrically opposed view:

> When Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity, which speaks directly to the issue we consider in this case. . . .
>
> Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. . . .
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> Oddly, the Court seizes upon the very clarity of the statute

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[228]Traynor, *supra* note 116, at 749.

[229]*See, e.g.*, Muniz v. Hoffman, 422 U.S. 454, 469 (1975); United Housing Found. v. Forman, 421 U.S. 837, 848-49 (1975); Philbrook v. Glodgett, 421 U.S. 707, 713-14 (1975); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 628 (1975).

[230]443 U.S. 193 (1979).

[231]42 U.S.C. § 2000e-2d (1970).

[232]443 U.S. at 201 (citations omitted).

> almost as a justification for evading the unavoidable impact of its language.[233]

Although this case was brought under Title VII of the Civil Rights Act of 1964,[234] the equal protection clause presents the nagging question: If you find support for equality under the Constitution, can you claim support for inequality under the same Constitution?

The current approach to statutory application demonstrates a fundamental difference in the process employed today from the process of fifty years ago. Today, what the legislature has said is not as important as what it supposedly intended. This approach is perhaps a combination of all three factors I have discussed in these pages—legal philosophy, jurisprudence, and jurisprudential temperament. Some judges look for ambiguities simply to achieve a result deemed desirable. They believe that the law "ought to be" somewhat different than that set forth in plain statutory language. In such cases the judge's temperament supplies the willpower and his subjective philosophy, the answer. And usually some fragment of legislative history is exalted to justify a conclusion that the legislative intent was at odds with precise statutory language. Such judicial activity may run afoul of the allocation of legislative competence. In the end, words must be taken for what they say and what the legislature intended to achieve, and not what their interpreter would like them to say. The statute is the master and not the servant of the judgment.

Another cause of this problem lies in the language of the jurisprudence as enacted by the legislative body. With the demise of the patronage system, the lack of discipline in national political parties, and the replacement thereof with the high-pressure influence of special interest groups and political action committees, statutes frequently are enacted that contain deliberate ambiguities. The congressional eye often is not focused on the national interest or a particular public policy so much as it is on the very pragmatic consideration: How will the statutory language affect my constituency? Will I be hurt or helped by it? Can I get away with an adequate explanation back home? As a result, that statutory language is often deliberately enigmatic and unintelligible. Hammered out in committee compromise, the language is often designed to mean all things to all people, with Congress recognizing that in the end the federal courts must interpret the statute. When that interpretation emerges from the courts, the legislator is in the position to tell complaining constituents that the problem with the bill was not with the

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[233]*Id.* at 216-17 (Burger, C.J., dissenting).

[234]Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

action of Congress, but the action of federal judges in interpreting it. It's a "fault is in the stars" philosophy.[235]

Whatever the reasons, judicial statutory interpretation is much different today than it was a half century ago. The words of a statute will be respected, it is true, but legislative intentions will be investigated and given equal, if not superior, respect. Less attention is now paid to the familiar teachings of a past era: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."[236] "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."[237]

> Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. . . . In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.[238]

But, perhaps, it is well that judges no longer follow the rigid semantic approach, because in the common law tradition a rule from case law is never considered *in vacuo*. The reason for the rule is always considered. No one said it better than Karl Llewellyn: "the rule follows where its reason leads; where the reason stops, there stops the rule."[239]

Yet, when all is said, it is difficult to lay down comprehensive guidelines of modern statutory construction. Perhaps the reason is found in a 1984 statement of the Supreme Court: "Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a

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[235]Judge Richard Neely of the West Virginia Supreme Court, a former state legislator, is more blunt:

> [A] legislature is *designed* to do nothing, with emphasis appropriately placed on the word "designed." The value of an institution whose primary attribute is inertia to politicians who wish to keep their jobs is that a majority of bills will die from inactivity; that then permits legislators to be "in favor" of a great deal of legislation without ever being required to vote on it. When constituents seek to hold a legislator responsible for the failure of a particular bill, he can say, plausibly, that it was assigned to a committee on which he did not serve and that he was unable to shake the bill out of that committee. If he has foreseen positive constituent interest, he can produce letters from the committee chairman in answer to his excited plea to report the legislation to the floor; correspondence of this sort is the stock in trade of legislators. Notwithstanding the earnest correspondence, it is quite possible that when the legislator and committee chairman were having a drink before dinner, the legislator indicated his personal desire to kill the bill in spite of the facade of excited correspondence.

R. NEELY, *supra* note 26, at 55.

[236]United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1868).

[237]Caminetti v. United States, 242 U.S. 470, 490 (1917).

[238]*Id.*

[239]K. LLEWELLYN, THE BRAMBLE BUSH 157-58 (1960).

particular statute. The variables render every problem of statutory construction unique."[240]

Nevertheless, this can be said: the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute appear to be the major aids in considering statutory precepts today.[241] A popular cynicism overstates "that only when legislative history is doubtful do you go to the statute."[242] Perhaps the reason for this aphorism is that recourse to legislative history is a favorite pastime of federal courts. Judges may use this approach because the federal judges have found it to be a useful technique, and also because the *Congressional Record* and committee reports are usually available. The practice is, however, open to criticism.[243] With typical incisiveness, Professor Leflar has observed:

> I think that it was Chief Justice Hingham . . . who said that the devil himself "knoweth not the mind of man." It is difficult to discover intent; and when you cannot discover with any authority the state of mind of one man, the process of discovering the states of mind, the intents of 535 men, who make up the Federal Congress, becomes an extremely difficult matter.[244]

Contemporary recourse to legislative history to divine the intent of the legislature is a relatively new development. Not practiced even a half century ago, this technique is a unique American methodology not followed in England.[245] As Lord Denning tells us:

> But oddly enough the Judges cannot look at what the responsible Minister said to Parliament—at the object of the Statute as he explained it to the House—or to the meaning of the words as he understood them. Hansard [British version of the *Congressional Record*] is for the Judges a closed book. But not for you [lawyers]. You can read what was said in the House and adopt it as part of your argument—so long as you do not acknowledge the source. The writers of law books can go further. They can

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[240]Weinberger v. Rossi, 456 U.S. 25, 28 (1982) (quoting United States v. Universal Corp., 344 U.S. 218, 221 (1952) (citations omitted)).

[241]United States v. Cooper Corp., 312 U.S. 600, 605 (1941), *cited in* Pfizer, Inc. v. Government of India, 434 U.S. 308, 313 (1978).

[242]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

[243]*Compare* the opinion for the Supreme Court in Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-36 (1974), *with* dissenting opinion of Mr. Justice Douglas, *id.* at 167-80, *and* the opinion of the district court, 383 F. Supp. 510, 520-30 (E.D. Pa. 1974).

[244]Remarks by Robert A. Leflar to Federal Appellate Judges' Conference, Federal Judicial Center, Washington, D.C. (May 13, 1975), *reprinted in* R. ALDISERT, THE JUDICIAL PROCESS 179 (1976).

[245]*See, e.g.*, Assam Railways & Trading Co., Ltd. v. Commissioners of Inland Revenue, [1935] A.C. 445; *see also* C. ALLEN, LAW IN THE MAKING 479-504 (5th ed. 1951).

> give the very words from Hansard with chapter and verse. You can read the whole to the Judges.[246]

As early as 1769, the English would say, "The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign."[247] Justice Frankfurter suggested that the recourse to reliance on legislative history was gradual.[248] Holmes gingerly approached this judicial technique, observing that "it is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage;"[249] and he once referred to earlier bills relating to a statute under review with the reservation, "If it be legitimate to look at them . . . ."[250] A serious question exists as to whether the concerns expressed in 1953 by Mr. Justice Jackson have ever been answered:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.[251]

Recourse to legislative history, however, will continue to be an important aspect of statutory interpretation because located there, more often than in the statutory language itself, judges of differing philosophies will find authority to justify their desired conclusions. Some statement of a representative or senator, or some excerpt from a committee report written by the congressional staff will serve as the necessary talisman. Such recourse may be truly validated only when it is recognized that the history is used as a factor in inductive reasoning to reach a conclusion. Congressman *A* said so and Congressmen *B* said so, and from these facts judges can conclude that the majority of the Senate and the House felt similarly. Obviously, such a generalization is valid only to the extent

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[246]A. DENNING, *supra* note 225, at 10 (citing Bradford City Council v. Lord Commission (July 1978) (unreported)).

[247]Frankfurter, *supra* note 242, at 541.

[248]*Id.* at 542-43.

[249]Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922).

[250]Davis v. Pringle, 268 U.S. 315, 378 (1925).

[251]United States v. Public Utilities Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); *see also* his opinion in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1952).

that the statements appeared in sufficient number or were cloaked with sufficient authority to permit the generalization. Otherwise, we are confronted with the material fallacy known as the Converse Fallacy of Accident. Also called the fallacy of selected instances or hasty generalization, this fallacy attempts to establish a generalization by the simple enumeration of instances without obtaining a representative number. A conclusion is derived before all the particular instances have been taken into consideration.

Irrespective of the use of legislative history to learn the congressional intent, or of lengthy semantic excursions into the dictionary to ascertain the statute's literal or plain meaning, the importance of statutory precept in today's judicial process cannot be overemphasized. The process is more sophisticated and complex, and requires the most careful attention of the legislature as well as the bench and bar.

C. The Lacunae or Nonexistent Norm

To be sure, it is often difficult to interpret that which the legislature intended to say, to interpret what may be called the unclear norm. Equally important is how to apply a statute to an aspect of a relevant problem when obviously, although covered by the statute, the specific problem clearly never occurred to the legislature at the time of the statute's enactment. This problem is not the problem of the unclear norm, but the problem of lacunae, of the nonexistent norm. Decades ago John Chipman Gray recognized the lacunae as a very serious problem:

> The fact is that the difficulties of so-called interpretation arise when the legislation has had no meaning at all; when the question which is raised in the statute never occurred to it; when the question is not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.[252]

Plowden, in his note in *Eyston v. Studd*[253] in 1574, made an observation that is in striking anticipation of modern principles of discerning the equity of a statute:

> And in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself an answer as you imagine he would have done, if he had been present. . . . And if the lawmaker would have followed

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[252]J.C. GRAY, *supra* note 100, at 172-73.

[253]2 Plowd. 463 (1574).

> the equity, notwithstanding the words of the law . . . you may safely do the like.[254]

Referring to Plowden, Lord Denning has written:

> Put into the homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this muck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.[255]

The civil law experience assumes that situations will occur that were not contemplated by the legislative draftsmen, and that they made adequate provisions for these occurrences. Perhaps the most well known model is the Swiss Civil Code of 1907:

> Where no provision [in the Code] is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law.[256]

But still another dimension of this problem is where the court finds a lacunae when there is no evidence that Congress left the matter open. An example can be found in *J.I. Case Co. v. Borak*[257] and its progeny and the relatively new practice of finding implied causes of action where the statute is silent. This federal court innovation marks a drastic departure from the general presumption that in statute law there is at least a presumption that on the topic it is dealing with, Congress said all that it wanted to say. But the discovery, if not the fabrication, of implied federal causes of action represents activity by judges described by Lord Devlin as "moths outside a lighted window, . . . irresistably attracted by what they see within as the vast unused potentiality of judicial lawmaking."[258] In *Cort v. Ash*,[259] the Supreme Court interpreted a federal criminal statute prohibiting corporations from making certain types of contributions in connection with a presidential election. The Court found that the language itself did not authorize, and Congress

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[254]*Quoted in* W. FRIEDMANN, *supra* note 99, at 453.

[255]A. DENNING, *supra* note 225, at 12 (citing Seaford Court Estates Ltd. v. Asher, [1949] 2 K.B. 481).

[256]SCHWEIZERISCHES ZIVILGESETZBUCH (CODE CIVIL SUISSE) (CODICE CIVILE SUIZZERO) § 1 (1907) (Williams trans. 1925). Similar provisions are found in the AUSTRIAN GENERAL CIVIL CODE OF 1811 (ALGEMEINES BUERGERLICHES GESETZBUCH § 7 (1811)); the SPANISH CIVIL CODE OF 1899 (CODIGO CIVIL ESPANOL § 6 (1899)); the ITALIAN CIVIL CODE (CODICE CIVILE ch. 2, § 12 (1942)); and the IRAQI CIVIL CODE OF 1951 art. I, §§ 1-3 (1951). *See also* Croker v. Boeing Co., 662 F.2d 975, 1000 (3d Cir. 1981) (Aldisert, J., dissenting).

[257]377 U.S. 476 (1964).

[258]P. DEVLIN, *supra* note 56, at 8.

[259]422 U.S. 66 (1975).

did not intend to so authorize, a shareholder to bring a private cause of action against a transgressing corporation. The Court developed four factors to use in determining whether a statute authorizes such a cause of action.[260]

Therein lies the problem. The factors identified by the Court leave more than enough maneuvering room for a judge to decide the issue either way, and the courts have done just that. There has not been much predictability to the cases. Some decisions have found no implied cause of action.[261] Others have swung in the other direction.[262] Relying on legislative history as an indication of whether a private cause of action is permitted once again involves all the dangers of drawing conclusions from bits and pieces of legislative history. The cases are in disarray, because the Supreme Court and other federal courts departed from traditional legal principles to achieve a result-oriented conclusion.

Courts seem to have ignored the reality that Congress knows when it wants to provide a cause of action and knows how to say it. Congress has proved this time and again since *J.I. Case Co. v. Borak* appeared on the scene.[263] The best (and the worst) that can be said for fabricating implied causes of action is that the judicial practitioners come in all stripes, in all economic and philosophical hues. Regardless of the label attached to a judge, a judge cannot circumvent a clear authorization of a cause of action.

At bottom always is the task of divining the intent of the legislature. "When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right,"[264] Learned Hand once observed. "Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves."[265]

VI. The Necessity for Reasoned Elaboration

Irrespective of the philosophy held by a particular judge or court majority, it is a categorical imperative that when universal principles are used to blaze new legal trails, there must be a reasoned elaboration for

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[260]*Id.* at 78.

[261]*See, e.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Piper v. Chris Craft Indus., 430 U.S. 1 (1977).

[262]*See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Cannon v. University of Chicago, 441 U.S. 677 (1979).

[263]*See, e.g.*, Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417 (1982); Consumer Credit Protection Act of 1968, 15 U.S.C. § 1693m (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982); National Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1686 (1982).

[264]L. Hand, The Spirit of Liberty 108 (2d ed. 1954).

[265]*Id.* at 109-10.

the decision. As I stated before, the public is entitled to know not only "the what" of a decision, but also "the why."[266] Appellate judicial decisions of precedential or institutional value are not majestic enough to stand unless supported by reason. To use Herbert Wechsler's formulation, these decisions must be principled, that is, resting "with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[267] In twenty-five years as a judge, I have gone through the experience of making a decision, but when it came down to preparing the public justification for it, I was unable to prepare a reasoned discourse. It simply would not wash. Being required to write an opinion buttressed me against myself.[268] Restraints of reason tend to insure the independence of a judge, to liberate him from the demands and fears—dogmatic, arbitrary, irrational, self-centered, or group-centered—that so often enchain other public officials and academic commentators.

Yet some major cases, or to use Holmes' formulation, lawmaking of molar proportions, have come down without supporting reasons. What then sets in is a sort of incestuous inbreeding in which no reason is given for subsequent cases except for a citation to the precedent or its progeny. I think that the application of the Bill of Rights against the states by way of the doctrine of selective incorporation into the fourteenth amendment, and especially the first amendment, illustrates my point. Another excellent example is the seminal case that led to the present generous interpretation of the first amendment, both in the speech and religion clauses.[269] I choose this as an example deliberately because I heartily endorse most of the present ramifications of this incorporation.

My analysis begins with the first amendment's mandate that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[270] Decades of Supreme Court case law make it clear that the first amendment mandate is no longer limited to statutes enacted by Congress. The fourteenth amendment does not explicitly incorporate the first within its language:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

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[266]*See supra* notes 110-12 and accompanying text.

[267]H. WECHSLER, PRINCIPLES, POLICIES AND FUNDAMENTAL LAW 21 (1961).

[268]I was buttressed against what Bickel described as a judge's own natural tendency "to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 82 (1978).

[269]*See* Horn v. Kean, 796 F.2d 668 (3d Cir. 1986) (Aldisert, C.J., plurality opinion).

[270]U.S. CONST. amend. I.

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[271]

Notwithstanding language expressly limiting the first amendment's application to acts of Congress, there is legislative history in the adoption of the fourteenth amendment to suggest that the intention of Congress was that the entire federal Bill of Rights was to be enforced by the states,[272] a view tenaciously defended by Justice Hugo Black.[273] Militating against this was the 1833 opinion by the venerable John Marshall in *Barron v. Baltimore*,[274] stating that the Bill of Rights applied only to the federal government. The Constitution, he said, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[275] John Marshall's opinion, of course, came down before passage of the fourteenth amendment. We know now that the first amendment "is made obligatory on the States by the Fourteenth" amendment.[276] The reasons for its incorporation into the fourteenth amendment are somewhat shrouded, and do not surface readily in Supreme Court opinions.

Perhaps a reasoned elaboration has never been set forth. In the parlance of Greco-Roman rhetoricians, we are given much *petitio principii* and very little *confirmatio*. For example, *Gitlow v. New York*,[277] often cited as the seminal case incorporating the free speech clause, involved a conviction under the New York Criminal Anarchy Act.[278] The Court ruled that the Act did not violate the substance of the first amendment. In doing so the court begged the question, substituted assumption for reason, and a conclusion for the point of beginning:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.[279]

Notwithstanding this scanty, if not ephemeral, explanation, we do recognize and reiterate that such incorporation has taken place, and enthusiastically agree that "this freedom is an inestimable privilege in a free government."[280]

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[271]U.S. CONST. amend. XIV, § 1.

[272]*See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

[273]*See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 268 (1952) (Black, J., dissenting).

[274]32 U.S. (7 Peters) 243 (1833).

[275]*Id.* at 247.

[276]Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Black, J., concurring).

[277]268 U.S. 652 (1925).

[278]N.Y. CONSOL. LAWS ch. 40 (1909).

[279]*Gitlow*, 268 U.S. at 666.

[280]*Id.* at 667.

Nevertheless, the present sweep of first amendment law is anchored on an assumption, and not upon reasoned elaboration.[281] How much more legitimate it would have been had this been supported by some reference to the fourteenth amendment's legislative history. Congressmen John A. Bingham of Ohio and Thaddeus Stevens of Pennsylvania, and Senators Jacob Howard of Michigan and Lyman Trumbull of Illinois led the fight for the fourteenth amendment.[282] Bingham specifically said that he intended to overturn the precedent set by John Marshall's opinion in *Barron v. Baltimore*.[283] Senator Howard, in discussing the rights embodied in the first eight amendments, said:

> [T]hese are secured to citizens solely as citizens of the United States, . . . they do not operate in the slightest degree as restraints or prohibitions upon state legislation. . . . The great object of the first section of this amendment is, therefore to restrain the power of the states and compel them at all times to respect these fundamental rights.[284]

But the Court has never accepted this legislative history. Instead, in 1937 it adopted a doctrine that has become known as "selective incorporation," a doctrine that has never been supported by convincing reasoned elaboration. Speaking through Justice Cardozo, the Court decided, without supporting legislative history, that it must be left to the Court to determine in each case "those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."[285] In *Palko v. Connecticut,*[286] the Court found that double jeopardy was not to be included among those fundamental rights, saying that this concept, like the right of trial by jury and to a grand jury, "may have value and importance. Even so, they are not at the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[287] The entire incorporation process, whether by judicial fiat as in the first amendment case in 1925,[288] or based on the litany of incorporations of other amendments in the 1960's and 1970's, is not taken from our jurisprudence. Rather, they are merely expressions of various legal philosophies held at different times by

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[281]Dean Erwin Griswold has commented, "I shall never understand how the First Amendment 'is made obligatory in the States by the Fourteenth.' I have the feeling that this will go down as one of the greatest ipse dixits in Supreme Court history." Griswold, *The Judicial Process*, 31 FED. BAR J. 309, 315 (1972).

[282]J. LIEBERMAN, *supra* note 148, at 167.

[283]32 U.S. (7 Pet.) 243 (1833). Congressman Bingham's remarks were made on February 27, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1865-66).

[284]CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-66).

[285]Palko v. Connecticut, 302 U.S. 319 (1937).

[286]*Id.*

[287]*Id.* at 325.

[288]Gitlow v. New York, 268 U.S. 652 (1925).

different judges.[289] They expressed the judges' views of what the law should be, a classic example of deontology, the theory of moral obligation or a statement of that which ought to be.

VII. Conclusion

I end as I began. As a long time judge-watcher, I believe that attaching one word labels to federal judges is a mighty inexact pastime. Ninety percent of the cases that come before us are rather simple matters implicating issues where the law and its application alike are plain or where the rule of law is certain and the application alone doubtful.[290] Jurisprudence controls such cases. The particular jurisprudential temperament of the judge and his or her legal philosophy do not figure largely in affecting the outcome. In the remaining ten percent of the cases, in Cardozo's words, a decision one way or the other "will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."[291] It is in these cases where the judge's complex personality comes under examination and dissection. Perhaps two anecdotes relating to games show the mix of legal philosophy, jurisprudence, and jurisprudential temperament that I have been discussing in these pages. The first comes from Professor Maurice Rosenberg, himself a long time judge-watcher:

> [There is] the well-known fable that has three baseball umpires arguing about how they distinguish balls from strikes during the game. The first one says: "It's simple. I call 'em as I see 'em." The second one snorts: "Huh! I call 'em as they are!" And the third one ends the debate with: "They ain't nothin' til I call 'em!"[292]

The other anecdote comes from Learned Hand:

> What are you to do when the meaning remains uncertain? Then, if the situation is not too bad, we say that we make a "just" interpretation. Remember what Justice Holmes said about "justice." I don't know what you think about him, but on the whole he was to me the master craftsman certainly of our time; and he said: "I hate justice," which he didn't quite mean. What he did mean was this. I remember I was once with him; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe. When we

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[289]Significantly, two of the rights deemed not "at the very essence of a scheme of ordered liberty" by Cardozo in *Palko*, have subsequently qualified as such. *See* Benton v. Maryland, 395 U.S. 784 (1969) (right against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right of trial by jury).

[290]*See* Aldisert, *supra* note 32, at 763.

[291]B. Cardozo, *supra* note 34, at 164.

[292]Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 640 (1971).

> got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here, come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."[293]

Our judges run the gamut from playing the game according to the rules to making up the rules as we play the game.

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[293]Hand, *A Personal Confession*, Continuing Legal Education for Professional Competence and Responsibility (the Report on the Arden House Conference, December 16-19, 1958) at 116-23, *reprinted in* R. ALDISERT, *supra* note 111, at 184-85.

Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees

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I. Introduction

The subjects of alcohol and drug abuse in the workplace and the acquired immune deficiency syndrome (AIDS) health crisis have received national attention during the past year. They have escalated from major public health concerns to major national, if not international, political concerns as well.

The impact of substance abuse on the nation's work force is staggering. It has been said that absenteeism among problem drinkers is up to 8.3 times greater than among other employees. It has further been said that almost forty percent of industrial fatalities and forty-seven percent of industrial injuries can be linked to alcohol abuse. When drug and alcohol abuse are combined, annual bottom line monetary losses approach one hundred billion dollars. Such a monetary loss translates into an annual cost of from $500 to $1000 per employee.[1]

The statistics regarding the AIDS health crisis are equally foreboding.[2] Of the approximately 30,400 persons in the United States who have been diagnosed as having AIDS, over half have already died.[3] Estimates of the number of persons in the United States who have been exposed to the AIDS virus range from 500,000 to as high as 2,000,000.[4] Increased health insurance costs,[5] losses in productivity, and lower morale will almost certainly result as the disease continues to take its toll.

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[1]T. Denenberg & R.V. Denenberg, Alcohol and Drugs: Issues in the Workplace 5, 7 (1983).

[2]Dr. James W. Curran, head of the AIDS Branch of the federal Centers for Disease Control in Atlanta, was recently quoted as saying that AIDS "is killing young men at a much higher rate than anything else that kills young men in our country." Altman, *New Fear on Drug Use and AIDS*, N.Y. Times, Apr. 6, 1986, at 1, col. 2.

Health and Human Services Secretary Otis R. Bowen has recently predicted that a worldwide AIDS epidemic will become so serious that it will dwarf in comparison other previous medical disasters such as the Black Plague, typhoid and smallpox. Indianapolis Star, Jan. 30, 1987, at 1, col. 3.

[3]N.Y. Times, Feb. 5, 1987, at A19, col. 1.

[4]*The AIDS Conflict*, Newsweek, Sept. 23, 1985, at 17.

[5]Researchers estimate that the cost of treating AIDS patients, although much lower than originally anticipated, could still represent over two percent of the nation's health-care bill by 1991. Dallas Times Herald, Dec. 12, 1986, at A22, col. 1.

The media and political attention directed to these issues has become relentless,[6] virtually transforming programs related to them into emotional and moral crusades. Many employers have responded to this widespread publicity and public concern over both substance abuse and AIDS by developing and implementing medical testing programs.[7] These programs raise serious legal issues—issues that are only now being defined and litigated.

This Article will focus, in very general terms, on the use of medical testing programs to screen private sector employees and job applicants for substance abuse or for the presence of AIDS antibodies.[8] The rapidly evolving central legal issues surrounding the implementation of such medical testing programs will be addressed first, followed by a discussion of some of the more significant legal issues involved when an employer relies on medical test results in making employment decisions.

II. Legal Issues Raised by the Implementation of Medical Testing Programs in the Private Sector Workplace

A. Constitutional Issues

Employees and job applicants who are reluctant to submit to a blood or urine test administered as part of an employer's medical testing

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[6]*See* President's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime (1986). The Commission recommended that "[g]overnment and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program." *Id.* at 485. *See also* the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. ____, enacted Oct. 27, 1986. This law mandates the creation of alcohol/drug abuse prevention, treatment, and rehabilitation programs for federal employees.

The recent well-publicized collision of an Amtrak passenger train and three Conrail locomotives near Baltimore, Maryland, on January 4, 1987, resulted in sixteen people being killed and 175 others being injured. During the investigation that followed, it was reported that both the Conrail engineer and brakeman showed traces of marijuana in their blood and urine. Indianapolis Star, Jan. 15, 1987, at 1, col. 1. This tragedy has served as the catalyst for further congressional consideration of new mandatory drug testing procedures in the federally regulated transportation industry, with several members of Congress having subsequently introduced legislation requiring the drug screening of airline and locomotive crews. *See* Daily Labor Report (BNA) No. 15, Jan. 23, 1987, at A3-A4.

[7]In 1985, nearly twenty-five percent of the Fortune 500 corporations routinely used urinalysis testing of employees and job applicants to detect illegal drug abuse. This percentage was only ten percent in 1982. *The Ruckus Over Medical Testing*, Fortune, Aug. 19, 1985, at 57. However, one recent survey has concluded that training supervisors to recognize signs of employee substance abuse may be a more effective way to curtail such abuse than urinalysis testing. *See* Daily Labor Report (BNA) No. 1, Jan. 2, 1987, at A3.

[8]Current medical testing techniques only indicate whether an individual's blood possesses AIDS antibodies. Presence of AIDS antibodies indicates only that an individual has experienced past exposure to the AIDS virus. It does not *conclusively* establish that the individual is a carrier of active virus, although the probability that the individual is is substantial. Nor does it conclusively establish that the individual will develop symptoms of AIDS related complex (ARC symptoms) or suffer the full blown disease state itself.

program frequently claim that these tests violate their fourth amendment right to be free from "unreasonable searches and seizures."[9] Such tests might at first blush seem to be a search and seizure within the meaning of the fourth amendment.[10] However, the United States Supreme Court has long held that such constitutional restraints apply to private, non-governmental entities only when their actions contain a "governmental nexus."[11] In a private employment context, an employer will almost never subject itself to such fourth amendment limitations unless it involves a law enforcement agency in the implementation of its testing program—thereby "entangling" a governmental entity in what would otherwise be a purely private action.[12] However, such a "governmental nexus" will also be found where a private entity is performing a "traditional governmental function"[13] or is so closely regulated by the state that its actions are seen as "state-compelled."[14]

In designing a medical testing program for a private sector employer, it is useful to consider the precise circumstances under which such programs have been upheld in the public sector, where employers are subject to fourth amendment limitations. The public sector testing programs that have recently withstood constitutional attack have specifically limited the circumstances under which testing of employees and job applicants can take place. For example, in *Sanders v. Washington Metropolitan Area Transit Authority*,[15] the United States District Court for the District of Columbia dismissed the fourth and fourteenth amendment claims of Transit Authority employees who were fired after blood and urine tests showed the presence of drugs and alcohol in their systems. The employer limited the administration of these tests to instances where an employee was involved in a serious accident or had returned from a period of sick leave.

The Seventh Circuit Court of Appeals has also held, in *Division 241 Amalgamated Transit Union v. Suscy*,[16] that the blood and urine tests required by a public transit authority of its bus drivers were *not* unreasonable searches under the fourth amendment and were not violative of these employees' constitutional rights.[17] These tests were limited by company policy to instances where drivers were directly involved in a

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[9]U.S. CONST. amend. IV.

[10]*See* McDonell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *modified*, 1 Indiv. Empl. Rights Cas. (BNA) 1297 (8th Cir. 1987).

[11]*See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

[12]*See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

[13]*See* Evans v. Newton, 382 U.S. 296 (1966).

[14]*See* Adickes v. Kress & Co., 398 U.S. 144 (1970).

[15]Civ. Act. No. 84-3072 (D.D.C. Jan. 9, 1986); *see also* Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985); Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, No. L-09500-185E (N.J. Super. Ct. Mar. 20, 1986).

[16]538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *see also* Brotherhood of Maintenance of Way Employees Lodge 16 v. Burlington N. R.R. Co., 802 F.2d 1016 (8th Cir. 1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

[17]*Suscy*, 538 F.2d at 1267.

serious accident or were suspected of being under the influence of an intoxicating liquor or a narcotic.[18]

In contrast to these cases, public employer testing programs providing for *random* drug testing or the blanket testing of employees *en masse*, without requiring at least a reasonable suspicion that tested employees are under the influence of or are using illicit drugs, have generally been struck down as violative of the fourth amendment.[19]

Private sector employees and job applicants may also challenge the implementation of medical testing programs under the theory that such programs violate state constitutional guarantees of freedom from "unreasonable searches." However, as with federal constitutional claims, private employers should be able to raise the defense of no "governmental nexus" to defeat these challenges to their testing programs. In Indiana, courts have long interpreted the state constitutional "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure"[20] to apply *only* to actions by the state and not to actions, however unauthorized, of *private* individuals.[21]

B. Statutory Issues

To date, no federal statute or Indiana law expressly forbids a private sector employer from instituting a testing program designed to detect substance abuse or the presence of AIDS antibodies. However, the states of Wisconsin and Massachusetts forbid employers from requiring job applicants or employees to submit to testing for AIDS as a condition of employment,[22] while the state of Oregon forbids an employer from requiring an employee to submit to a breathalyzer test without a showing that the employer had reasonable grounds to believe the employee was

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[18]*Id.*

[19]*See* Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Penny v. Kennedy, 1 Indiv. Empl. Rights Cas. (BNA) 1047 (E.D. Tenn. 1986); National Treasury Employees Union v. von Raab, No. 86-3522 (E.D. La. Nov. 14, 1986); AFGE v. Weinberger, 1 Indiv. Empl. Rights Cas. (BNA) 1137 (S.D. Ga. 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); Caruso v. Ward, 506 N.Y.S.2d 789 (1986).

But see McDonell v. Hunter, 1 Indiv. Empl. Rights Cas. (BNA) 1297 (8th Cir. 1987), where the Eighth Circuit Court of Appeals recently expanded the circumstances under which the Iowa Department of Corrections could test its employees for substance abuse to include *systematic random* urinalysis testing and testing based upon a "reasonable suspicion" that an employee has used a controlled substance within the 24-hour period prior to such required test. *See also* Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), where the Third Circuit Court of Appeals upheld a drug testing program that required licensed thoroughbred race horse jockeys and other race track employees to submit to *random* post-race urine tests.

[20]IND. CONST. art. 1, § 11 (1978).

[21]*See* Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972); Antrup v. State, 175 Ind. App. 636, 373 N.E.2d 194 (1978).

[22]*See* WIS. STAT. §§ 103.15, 146.025 (1985); Labor L. Rep.-Empl. Prac. (CCH) No. 281, at 4 (Sept. 22, 1986).

under the influence of an intoxicant.[23] Furthermore, several municipalities have enacted ordinances that limit an employer's right to test employees randomly for drug abuse.[24]

C. Common Law Issues

A significant legal concern for private sector employers is the ever-increasing variety of civil tort actions which are being brought by employees and job applicants as a result of employer implementation of mandatory medical testing programs.[25] An employer instituting such a testing program may face tort liability on such theories as:

1. *Invasion of the Right of Privacy.*—The common law right of privacy exists in varying degrees for all persons. Although not an absolute right, it does include the right to be free from *unreasonable* intrusions.[26] In *Continental Optical Co. v. Reed*,[27] the Indiana Court of Appeals adopted the following definition of this common law right: "The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."[28] In an employment setting, the use of medical testing after an industrial accident, poor performance, gross insubordination, or other serious work-related problem should *not* ordinarily result in a meritorious suit for invasion of privacy, because

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[23]Or. Rev. Stat. § 659.225 (1981).

[24]*See, e.g.*, San Francisco, Cal., Ordinance No. 527-85 (1986); Daily Labor Report (BNA) No. 169, Sept. 2, 1986, at A7. However, on December 8, 1986, the New Jersey Assembly passed Assembly Bill No. 2850, which would *permit* employers to test both public and private sector employees for drugs unless such testing was forbidden by a collective bargaining agreement. The bill must still be approved by the state Senate and signed by the Governor before it becomes law. Daily Labor Report (BNA) No. 1, Jan. 2, 1987, at A2.

[25]However, tort claims by employees or their union representatives may be limited or barred through pre-emption by federal or state statutes. *See, e.g.*, Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) (employee's various tort claims stemming from a company drug investigation held to be pre-empted by the National Labor Relations Act); Moore v. General Motors, 739 F.2d 311 (8th Cir. 1984) (employee's tort claim held to be pre-empted by the Labor Management Relations Act); Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984) (former employee's tort claim held to be pre-empted by the Employee Retirement Income Security Act of 1974); Mein v. Masonite Corp., 485 N.E.2d 312 (Ill. 1985) (former employee's tort claim held to be pre-empted by the Illinois Human Rights Act).

[26]*See generally* Restatement (Second) of Torts, § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

[27]119 Ind. App. 643, 86 N.E.2d 306 (1949).

[28]*Id.* at 648, 86 N.E.2d at 308 (quoting Annotation, *Right of Privacy*, 138 A.L.R. 22 (1942)).

in these instances a *reasonable* basis may exist for such a medical "intrusion."

While no Indiana court has specifically ruled on the issue of whether mandatory drug testing violates an employee's common law right of privacy, where a medical screening test is performed in an *improper* manner, court decisions from other jurisdictions suggest that grounds may exist for an action alleging an invasion of privacy. For example, in *O'Brien v. Papa Gino's*,[29] the First Circuit Court of Appeals recently upheld a damage award of almost $450,000 to an employee terminated after he failed a polygraph test which he was required to take when his employer suspected him of off-duty illegal drug use.[30] The jury found that the employer-hired polygraph examiner violated the employee's right of privacy by asking questions about private matters unrelated to his employment.[31]

2. *Intentional Infliction of Emotional Distress.*—An employer who does not give employees or job applicants "adequate notice" before requiring them to submit to medical testing may risk liability for the intentional infliction of emotional distress. In many states, such a cause of action is premised upon the "unreasonableness" of the employer's actions, without regard to whether or not the employee has been physically injured.[32] The law in Indiana regarding this common law right has long been to the contrary, holding that damages are recoverable *only* when there has been a psychic injury to the plaintiff and a physical manifestation resulting from that psychic injury.[33] However, in *Moffett v. Gene B. Glick Co.*,[34] the United States District Court for the Northern District of Indiana recently recognized an exception to this general rule in cases where "(1) there is a tort which invades a legal right of the plaintiff; (2) which is likely to provoke an emotional disturbance or trauma; and (3) the defendant's conduct is willful, callous, or malicious."[35] It remains to be seen whether Indiana courts will accept this newly-created exception to the general rule.

3. *Assault and Battery.*—An employer may be liable for assault and battery committed by its agents who engage in medical testing if they "force" an employee or job applicant to take a medical test against his or her will or if they otherwise wrongfully touch such person. For example, in *State v. Hamilton*,[36] an employer was held liable for injuries caused by an employer-hired polygraph examiner when that examiner

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[29]780 F.2d 1067 (1st Cir. 1986).

[30]*Id.* at 1068.

[31]*Id.* at 1072.

[32]*See, e.g.*, Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986).

[33]*See* First Fed. Sav. & Loan Ass'n v. Stone, 467 N.E.2d 1226, 1235 (Ind. Ct. App. 1984); Gaskins v. Runkle, 25 Ind. App. 584, 58 N.E. 740 (1900).

[34]621 F. Supp. 244 (N.D. Ind. 1985).

[35]*Id.* at 284.

[36]42 Fair Empl. Prac. Cas. (BNA) 1069 (N.Y. Sup. Ct. Dec. 19, 1986).

fondled a female applicant while conducting a pre-employment polygraph test.[37]

4. *False Arrest or Imprisonment.*—An employer may also be liable for false imprisonment if its medical testing agents unreasonably detain an employee in order to administer a medical test or for false arrest if its agents make a "citizen's arrest" based upon their erroneous assumption that an individual is under the influence of a controlled substance.[38]

D. Collective Bargaining Relationship Issues

Private sector employers whose employees are represented by a labor union may be prohibited from unilaterally implementing an employee medical testing program by either the National Labor Relations Act or restrictive language contained in their collective bargaining agreements.[39]

Under sections 8(a)(5) and 8(d) of the National Labor Relations Act, an employer must meet and bargain in good faith with the union representing its employees with respect to wages, hours, and other terms and conditions of employment.[40] While the National Labor Relations Board (NLRB or Board) has not yet ruled on the precise question of whether there is a general duty to bargain over the implementation of a medical testing program designed to detect substance abuse or the presence of AIDS antibodies,[41] the Board has ruled that the institution of polygraph testing programs, psychological stress examinations, pulmonary or auditory testing programs, or general physical examinations does affect terms and conditions of employment and is therefore a mandatory subject of bargaining.[42] By analogy, it appears quite likely that, absent a clear and unequivocal union waiver, a private sector employer is required to give prior notice to the union of its proposed

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[37]*Id.*

[38]*See, e.g.*, Black v. Kroger Co., 527 S.W.2d 794 (Tex. Civ. App. 1975) (plaintiff recovered over $25,000 in damages for false imprisonment when her employer's agent detained her and accused her of theft); *see also* Hill v. Georgia Power Co., 122 L.R.R.M. (BNA) 2779 (11th Cir. 1986).

[39]*See, e.g.*, Daily Labor Report (BNA) No. 209, Oct. 29, 1986, at A7 (Arbitrator Richard R. Kasher ruled that NFL Commissioner Rozelle's unilateral implementation of random drug screening tests for league players violated the terms of the parties' collective bargaining agreement).

[40]29 U.S.C.S. §§ 151-187 (Law. Co-op. 1975).

[41]*But see* California Cedar Prods. Co., 123 L.R.R.M. (BNA) 1355 (1986), where an NLRB Associate General Counsel recently advised an NLRB Regional Director that an employer had no statutory duty *to bargain* with a union over the implementation of a new substance abuse policy. This ruling may be limited to the facts in this case, where the parties' collective bargaining agreement allowed the employer to make "reasonable rules" regarding the possession of alcoholic beverages or drugs and required the employer only to *advise* the union thereof. *See generally* NLRB General Counsel Memorandum No. GC 86-11 (Nov. 24, 1986).

[42]*See* Lockheed Shipbuilding Co., 273 N.L.R.B. 171 (1984); Gerry's I.G.A., 238 N.L.R.B. 1141 (1978); Medicenter, Mid-South Hosp., 221 N.L.R.B. 670 (1975); LeRoy Mach. Co., Inc., 147 N.L.R.B. 1431 (1964).

implementation of a medical testing program and to bargain with the union in good faith concerning such a proposal if the union so requests.

In the event an employer decides unilaterally to institute a medical testing program *without* engaging in prior good-faith bargaining with the union, the most likely forum for a review of this decision is before a labor arbitrator. This forum is likely because the NLRB has a deferral policy under which it will defer ruling on a "duty to bargain" allegation pending resolution of a dispute under the parties' contractual dispute settlement procedures.[43] Courts are reluctant to enjoin an employer's unilateral actions when the union is able to pursue a contractual remedy.[44]

Arbitrators will look to several factors when determining whether an employer's unilateral implementation of a medical testing program is permissible under a collective bargaining agreement. These factors include: the express language of the agreement, the history of contract negotiations between the parties, and whether there has been a past practice of permitting the employer unilaterally to change working conditions. In *American Standard*,[45] Arbitrator Katz relied upon a broad management rights clause in the contract and a provision therein which gave management the right to require employees to submit to fitness for duty medical examinations in upholding the discharge of an employee who refused to submit to a medical screening test.[46] In contrast, Arbitrator O'Brien, in *Southern Pacific Transportation Co.*,[47] found that the parties'

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[43]*See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); *see also* United Technologies Corp., 268 N.L.R.B. 557 (1984). However, if an employer's unilateral institution of a drug testing program arguably results in the modification of *existing* collective bargaining agreement language, the *Collyer* deferral doctrine may not apply in a dispute over the existence of such a contract modification. *See* Anaconda Co., 224 N.L.R.B. 1041 (1976), *enforced mem.*, 578 F.2d 1385 (9th Cir. 1978).

[44]*See* Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R. Co., 802 F.2d 1016 (8th Cir. 1986); IBEW, Local 1900 v. Potomac Elec. Power Co., 121 L.R.R.M. (BNA) 3287 (D.D.C. 1986); Oil, Chem. & Atomic Workers Local 6-10 v. Amoco Oil Co., Civ. No. A1-86-186 (D.N.D. Oct. 27, 1986); Oil, Chem. & Atomic Workers Local 2-124 v. Amoco Oil Co., No. C86-354 (D. Wyo. Nov. 10, 1986); Association of W. Pulp & Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986). *But see* Utility Workers Union of Am., Local 246, No. CV86-8250-HLH (CTx) (C.D. Cal. Feb. 9, 1987); IBEW Local Sys. Council U-90 v. Metropolitan Edison, No. 84-4426 (D. Pa. Aug. 6, 1986); Murray v. Brooklyn Union Gas Co., No. 7692/86 (N.Y. Sup. Ct., Kings Co., Apr. 1, 1986); Oil, Chem. & Atomic Workers Union Local 2-286 v. Amoco Oil Co., No. 86-C-09880 (D. Utah Oct. 29, 1986).

[45]77 Lab. Arb. (BNA) 1085 (1981) (Katz, Arb.); *see also* Concrete Pipe Prod. Co., Inc., FMCS No. 86K/1729b (1986) (Caraway, Arb.) (upheld the discharge of an employee who refused to comply with a drug testing program that had been unilaterally implemented by his employer without union objection).

[46]77 Lab. Arb. (BNA) at 1087-88.

[47]79 Lab. Arb. (BNA) 618 (1982) (O'Brien, Arb.); *see also* Faygo Beverages, Inc. and Teamsters, Local Union No. 337, 86-1 Lab. Arb. Awards (CCH) ¶ 8302 (June 30, 1986) (Ellman, Arb.); Metropolitan Edison Co., AAA No. 14 300 093886 (Oct. 9, 1986) (Aarons, Arb.); Association of W. Pulp & Paper Workers Local 180 and Boise Cascade Corp., Daily Labor Report (BNA) No. 12, Jan. 20, 1987, at A4, where Arbitrator Kagel found that an employer's drug testing program violated its collective bargaining agreement because the program subjected employees who refused to submit to such testing to disciplinary punishment. Arbitrator Kagel ruled that this provision of the program ran counter to a contractual requirement that discipline be imposed only for "just cause,"

fifty-year-old past practice of using visual observation to determine whether employees were under the influence of alcohol prevented the employer from unilaterally changing this practice by requiring suspect employees to submit to a blood alcohol test.[48]

III. Legal Issues Raised by the Use of Medical Test Results to Make Employment Decisions

A. Constitutional Issues

Private sector job applicants who are not hired or current employees who are discharged based upon medical test results obtained as part of an employer's medical screening program may claim that such actions violate their fifth amendment right not to be deprived of their liberty or property without "due process of law."[49] However, such employment decisions, when made by a private employer, should not raise constitutional issues absent the showing of some nexus between these actions and a governmental entity.

In contrast, public sector *non-probationary* employees do have a property interest in their jobs and a constitutional right to due process when they are terminated from public employment. Even when this constitutional right exists, however, the Supreme Court has held that it only requires an employer to provide such employees with oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story.[50] The Court has held that public sector *probationary* employees who are discharged have only a constitutionally protected "liberty interest" in not being discharged in a manner that creates a false and defamatory impression that stigmatizes and forecloses them from other employment opportunities.[51]

B. Statutory Issues

Several federal and state statutes, discussed below, limit a private sector employer's use of medical test results as the basis for not hiring a job applicant or for terminating the employment of a current employee.

1. *Title VII of the Civil Rights Act of 1964.*—Title VII of the Civil Rights Act of 1964[52] prohibits an employment practice that has an adverse impact on one or more protected classifications (race, color, religion, sex, or national origin) unless an employer can demonstrate a legitimate business necessity for the practice. Under these statutory cri-

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in that it improperly shifted the evidentiary burden by forcing an employee, required to submit to a drug test under a threat of discipline, to prove his innocence.

[48]79 Lab. Arb. (BNA) at 627.

[49]U.S. Const. amend. V.

[50]*See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

[51]*See* Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693 (1976).

[52]42 U.S.C.S. §§ 2000e to e-17 (Law. Co-op. 1978).

teria, an employer could be required to defend its medical testing program if, for example, a disappointed black job applicant could demonstrate that more blacks than whites were excluded as a result of the employer's no-alcohol, no-drugs policy.

In *Toledo v. Nobel-Sysco, Inc.*,[53] the United States District Court for the District of New Mexico recently held that an employer violated Title VII by refusing to hire a member of the Native American Church because the job applicant had a religious practice of using peyote, a stimulant drug.[54] The court held that despite the employer's policy of not hiring truck drivers who used illegal drugs, the employer had a duty to "accommodate" the applicant and not allow him to drive while under the influence of peyote, rather than simply refusing to hire him based upon his religious practices.[55]

However, in *New York City Transit Authority v. Beazer*,[56] the United States Supreme Court dismissed a claim alleging that the Transit Authority's policy of excluding all methadone users from employment based upon safety considerations violated Title VII, even though eighty-one percent of the employees referred to the Transit Authority's medical consultant for suspected drug abuse under this policy were black or Hispanic.[57]

2. *The Rehabilitation Act of 1973.*—The Rehabilitation Act of 1973[58] applies to certain federal contractors, subcontractors, and employers who receive federal financial assistance. Section 503 of this Act requires enterprises with a federal contract or subcontract of $2,500 or more to take affirmative action to hire and advance in employment "qualified handicapped individuals."[59] Section 504 of the Act prohibits any enterprise receiving federal financial assistance from discriminating against otherwise qualified "handicapped individuals."[60] Under both of these sections, a "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."[61] This definition of a "handicapped individual" was amended by Congress in 1978 to exclude, in an employment context,

> any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by

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[53]41 Fair Empl. Prac. Cas. (BNA) 282 (D.N.M. 1986).
[54]*Id.* at 289.
[55]*Id.*
[56]440 U.S. 568 (1979).
[57]*Id.* at 594.
[58]29 U.S.C.S. §§ 701-800 (Law. Co-op. 1982).
[59]*Id.* § 793(a).
[60]*Id.* § 794.
[61]*Id.* § 706(7)(B).

reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[62]

An employer subject to this Act risks liability if it refuses to employ a person whose test results show may be an alcohol or drug abuser and thus possibly handicapped, unless the employer is able to show that such abuse would prevent the person from performing his job duties or would pose a threat to the safety or property of others.[63] For example, in *Healey v. Bergman*,[64] a current alcoholic was held not to be per se disqualified as a "handicapped individual" under the Act, despite the fact that he would need to miss sixty days of work due to his confinement in a detoxification center.[65] The United States District Court for the District of Massachusetts found that this factual situation did not automatically mean that the employee could not perform his job.[66] While no court has to date specifically held that a current drug addict is a "handicapped individual" under the Act, several courts, including the Seventh Circuit Court of Appeals, have stated in dictum that individuals with *current* problems of alcohol or drug abuse qualify as "handicapped individuals."[67]

The question of whether an employee or job applicant infected with the AIDS virus is a "handicapped individual" entitled to protection under this Act has not yet been finally decided.[68] However, the Justice Department has taken the position that discrimination based upon the disabling effects of AIDS violates section 504 of the Act, but that the Act's protection *does not extend* to employees infected with the AIDS virus who are discriminated against solely as a result of an employer's

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[62]*Id.*

[63]Furthermore, it appears that *former* alcoholics and drug addicts are "handicapped individuals" under this Act, due to their record of having had major life activities substantially limited by their substance abuse. *See, e.g.*, Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985) (former alcoholic); Johnson v. Smith, 39 Fair Empl. Prac. Cas. (BNA) 1106 (D. Minn. 1985) (former drug addict); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983) (former alcoholic); McGarvey v. District of Columbia, 468 F. Supp. 687 (D.D.C. 1979) (former drug addict).

[64]37 Fair Empl. Prac. Cas. (BNA) 1589 (D. Mass. 1985).

[65]*Id.* at 1590.

[66]*Id.* at 1595.

[67]*See* Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Davis v. Bucher, 451 F. Supp. 791, 797 n.4 (E.D. Pa. 1978). *But see* Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986) (police officer addicted to heroin was ruled *not* to be a "handicapped individual" under the Act).

[68]*See* Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987) (holding that a contagious disease (tuberculosis) is a "handicap" under the Act). This ruling could be cited as precedent for the inclusion of other contagious diseases, such as AIDS, within the class of handicaps protected by this Act. *See also* Thomas v. Atascadero Unified School Dist., No. 886-609 AHS (BY) (C.D. Cal. Nov. 17, 1986) (district judge ruled that AIDS is a "handicap" under the Act).

belief that such employees are capable of transmitting the virus to other employees.[69]

3. *The Vietnam Veterans Readjustment Act.*—The Vietnam Era Veterans' Readjustment Assistance Act of 1972[70] may also limit a private employer's use of medical test results in making employment decisions. Section 402 of the Act requires businesses that have certain federal contracts of $10,000 or more to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era."[71] The Act defines a "special disabled veteran" as "(A) a veteran who is entitled to compensation under laws administered by the Veterans' administration for a disability . . . or (B) a person who was discharged or released from active duty because of a service-connected disability."[72] Failure to employ or retain such a veteran on the basis of a test result showing possible alcohol or drug abuse or the presence of AIDS antibodies may violate this Act if such a condition was service-connected and resulted in discharge or release from active duty.

4. *Employee Retirement Income Security Act of 1974.*—While not primarily a fair employment statute, another federal law that limits a private employer's use of medical test results to screen out employees posing high health cost risks, such as alcoholics, drug addicts, or AIDS victims, is the Employee Retirement Security Act of 1974 (ERISA).[73] Section 510 of the Act forbids an employer from discharging an employee "for the purpose of interfering with the attainment of any right to which [that employee] may become entitled" under an employee benefit plan.[74] The Seventh Circuit Court of Appeals, in *Kross v. Western Electric Co.*,[75] found that an employee's allegation that he was discharged for the purpose of denying him continued participation in a company-provided medical insurance plan stated a claim under section 510 of ERISA.[76]

5. *State and Local Laws.*—Private employers must also be aware of state and local laws that prohibit discrimination against handicapped individuals. There is a clear split of authority between the states as to

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[69]Daily Labor Reporter (BNA) No. 122, June 25, 1986, at A8. However, despite the Justice Department's position, recent court decisions suggest that an employer may *not* be justified in refusing to hire or retain a person diagnosed as or suspected to be an AIDS victim out of fear that such person will transmit the disease to third parties. In this regard, see Phipps v. Saddleback Valley United School Dist., No. 474981 (Orange Cty. Sup. Ct. Feb. 20, 1986); District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986); *see also* Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, No. 86-4235 (E.D. La. filed Sept. 29, 1986).

[70]38 U.S.C.S. §§ 2011-2014 (Law. Co-op. 1981).

[71]*Id.* § 2012(a).

[72]*Id.* § 2011(1).

[73]29 U.S.C.S. §§ 1001-1461 (Law. Co-op. 1982).

[74]*Id.* § 1140.

[75]701 F.2d 1238 (7th Cir. 1983).

[76]*Id.* at 1242-43.

whether alcohol and drug abuse should be considered a "handicap" under state handicap statutes,[77] whereas the states appear to be in agreement that a person with AIDS is a covered "handicapped individual."[78] The states of California and Florida, as well as several municipalities, have enacted specific laws forbidding employers from discriminating against anyone who has tested positive for AIDS antibodies.[79]

C. *Common Law Issues*

Just as private sector employers face an ever-increasing variety of civil tort actions brought as a result of the promulgation and implementation of mandatory medical screening programs, employees and job applicants are also bringing causes of action alleging injuries suffered as a result of an employer's use of the test results obtained from such testing programs. In this regard, recent cases have involved allegations that an employer is liable for:

1. *Invasion of the Right of Privacy.*—As noted by the United States District Court for the Southern District of Iowa in *McDonell v. Hunter*:[80]

> [B]oth blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate *expectation of privacy in such personal information contained in his body fluids.*[81]

An employer may be held to have violated an employee's right of privacy by unreasonably disclosing that employee's medical test results.

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[77]*See, e.g.*, Connecticut Gen. Life Ins. Co. v. DILHR, 18 Fair Empl. Prac. Cas. (BNA) 1447 (Wis. 1979) (handicap); Welsh v. Municipality of Anchorage, 676 P.2d 602 (Alaska 1984) (alcoholism not physical handicap).

[78]A recent National Gay Rights Advocates survey found that 33 states accept AIDS-related discrimination complaints and that 21 of these states have formally declared "that AIDS-based discrimination is prohibited under handicap laws." Daily Labor Report (BNA) No. 182, Sept. 19, 1986, at A-16.

See 2 Empl. Prac. Guide (CCH) ¶ 5014 (Florida); ¶ 5020 (Oregon); ¶ 5023 (Maine); ¶ 5025 (Massachusetts); ¶ 5026 (New Jersey) (1986); Daily Labor Report (BNA) No. 179, Sept. 16, 1986, at A4, No. 182, Sept. 19, 1986, at A16. *See also* Shuttleworth v. Broward County, No. 85-6623-CIV (S.D. Fla. settlement reached Dec. 5, 1986) (employer alleged to have discriminatorily fired an employee diagnosed as having AIDS settled the case by agreeing to rehire the employee and pay him almost $200,000); Racine Educ. Ass'n. v. Racine United School Dist., ERD Case 50279 (Wisconsin, DILHR, Apr. 30, 1985); Doe v. Sinacola & Sons Excavating, Inc., No. 86-320825NZ (Oakland Cty. Cir. Ct. filed Oct. 9, 1986) (employee fired after having been diagnosed with AIDS filed a $10 million lawsuit against his former employer alleging a violation of state handicap discrimination laws).

[79]*See* CAL. HEALTH & SAFETY CODE § 199.38 (West Supp. 1986); FLA. STAT. § 381.606 (West 1986); Los Angeles Municipal Code, ch. III, art. 5.8, §§ 45.80-45.93; San Francisco Municipal Code, Part II, ch. VIII, art. 38, §§ 3801-3816 (1985); Austin, Texas, Ordinance, Daily Labor Report (BNA) No. 250, Dec. 31, 1986, at A3.

[80]612 F. Supp. 1122 (D. Iowa 1985).

[81]*Id.* at 1127 (emphasis added).

For example, in *Bratt v. IBM Corp.*,[82] the Massachusetts Supreme Court found that under a state statute forbidding unreasonable interference with a person's privacy, an employer's disclosure of private medical facts about an employee through an intra-corporate communication was sufficient publication to invade that employee's right of privacy.[83]

2. *Negligence.*—Employees and job applicants have also sought to recover damages for the negligence of employer-hired medical testing agents who have allegedly erroneously interpreted medical test results. For example, in *Olson v. Western Airlines*,[84] the California Court of Appeals ruled that a disappointed job applicant could sue a potential employer for the negligence of an employer-hired physician who erroneously diagnosed the applicant as being prediabetic.[85] Also, in *Armstrong v. Morgan*,[86] an employee who was fired as a result of an employer-hired physician's report which inaccurately diagnosed him as being in poor physical condition was able to sue the physician for damages caused by his negligence.[87]

An employer may also be liable for negligently hiring or failing to supervise adequately an employee whose medical test results show to be a possible alcohol or drug abuser or to be a carrier of the AIDS virus[88] and who later injures or causes the injury of another due to such abuse or infection. For example, in *Colwell v. Oatman*,[89] an employer was found to have been negligent in hiring a laborer from a temporary employment service who, due to his intoxication, caused the injury of another employee.[90] Moreover, in *Otis Engineering Corp. v. Clark*,[91] an employer settled a case for more than $600,000 where it was alleged that the employer negligently supervised an intoxicated employee by letting him drive his automobile from company property.[92]

An employer may also be held liable for negligently failing to warn others of known workplace health hazards, as well as for negligently failing to disclose to an employee test results showing that he may be infected with a harmful or infectious disease, such as AIDS. For example,

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[82]392 Mass. 508, 467 N.E.2d 126 (1984).

[83]*Id.* at 515-16, 467 N.E.2d at 134.

[84]143 Cal. App. 3d 1, 191 Cal. Rptr. 502 (1983).

[85]*Id.*, 191 Cal. Rptr. at 507-08.

[86]545 S.W.2d 45 (Tex. Civ. App. 1976).

[87]*Id.* at 47.

[88]*See* Doe v. American Airlines, No. 86 L 19638 (Cook Cty. Cir. Ct. Sept. 2, 1986) (woman bitten by an airline ticket agent who later tested sero-positive for AIDS is suing the airline for $12 million in damages based on a "negligent hiring" theory).

[89]32 Colo. App. 171, 510 P.2d 464 (1973).

[90]*Id.* at 176-77, 510 P.2d at 466-67.

[91]668 S.W.2d 307 (Tex. 1983); *see also* Brockett v. Kitchen Boyd Motor Co., 264 Cal. 2d 69, 70 Cal. Rptr. 136 (1968). *But see* Chesterman v. Barmon, 82 Or. App. 1, 727 P.2d 130 (1986).

[92]The intoxicated employee was involved in a fatal traffic accident shortly thereafter. 668 S.W.2d at 308.

in *Union Carbide & Carbon Corp. v. Stapleton*,[93] the plaintiff recovered damages from his former employer for the employer's negligence in not informing him of the results of a company-administered X-ray test which showed the presence of a tubercular condition.

3. *Defamation.*—An employer also faces liability for defamation if it wrongfully labels an employee or job applicant as a substance abuser or an AIDS victim based upon its erroneous interpretation of medical test results. For example, in *Houston Belt and Terminal Railway Co. v. Wherry*,[94] an employee was awarded $200,000 in damages because his former employer had falsely reported that the employee had methadone in his blood.[95] Further analysis showed the original test results to be inaccurate and that the employee actually had another substance chemically similar to methadone in his blood.[96]

4. *Wrongful Discharge.*—An employer whose employees are not represented by a union must be cognizant of their common law contractual rights when deciding whether to terminate them on the basis of adverse medical test results. Such employees may allege contractual protection based upon an express written contract, an oral contract, or a contract implied by a company personnel manual or employee handbook. Indiana courts have so far refused to find an implied employment

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[93]237 F.2d 229 (6th Cir. 1956). *See generally* RESTATEMENT (SECOND) OF AGENCY § 492 (1958). However, if an employer informs his work force of the presence of an AIDS-infected employee, he may be faced with co-workers who refuse to work with that employee out of fear for their own safety. Such concerted activity is protected conduct under section 7 of the National Labor Relations Act if it is based upon a "reasonable" fear of a real danger of death or serious injury. *See* 29 U.S.C.S. § 157 (Law. Co-op. 1975); 29 C.F.R. 1977.12(b)(2) (1986). Such concerted activity may also be protected under section 502 of the Labor Management Relations Act if it is based on "objective evidence" of exposure to an "abnormally dangerous condition." *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 386-87 (1974); 29 U.S.C.S. § 143 (Law. Co-op. 1975). Finally, under the Occupational Safety and Health Act of 1970, an employer cannot retaliate against employees who refuse to be exposed to a health hazard they have asked the employer to correct if they in good faith "reasonably believe" it poses a danger of serious injury or death. *See* Marshall v. Babcock & Wilcox Co., 7 O.S.H. Cas. (BNA) 2021 (E.D. Mich. 1979); 29 U.S.C.S. § 660(c)(1) (Law. Co-op. 1982); *see also* Minnesota Dep't of Corrections, 85 Lab. Arb. (BNA) 1185 (1985) (Arbitrator Gallagher held that a prison guard who refused to conduct pat searches of inmates because of his fear of becoming contaminated with AIDS was wrongfully discharged for insubordination. The employer was found to have been partially responsible for the guard's fear of contracting AIDS by having earlier distributed a memo which stated that "No one really knows all the ways AIDS is transmitted, so be careful.").

A better approach for an employer would be to educate its workforce on the medical facts regarding the transmission of the AIDS virus and the unlikelihood of an employee becoming infected through normal workplace conduct. Such education may make later employee refusals to work with an AIDS victim unprotected activity under these above-mentioned statutes, as such refusals would not be based upon a "reasonable" fear of danger derived from "objective" evidence.

[94]548 S.W.2d 743 (Tex. Civ. App. 1976), *cert. denied*, 434 U.S. 962 (1977).

[95]*Id.* at 746.

[96]*Id.*

contract to have been created by an employee handbook or personnel manual,[97] but courts in other states have found that such documents create employment contracts.[98] If an employment contract is found to exist, an employer may be limited by its terms to discharging employees only for "just cause" or in accordance with specified contractual disciplinary procedures.[99]

D. Unemployment Compensation Issues

An employee discharged on the basis of medical test results showing the on-duty presence of alcohol or illegal drugs may be eligible for benefits under state unemployment compensation laws, unless the employer can demonstrate that such misconduct was "willful" and impaired the employee's ability to perform his job duties.[100] For example, the Indiana Employment Security Division Review Board upheld the benefits claim of an employee who reported for work after consuming alcoholic beverages.[101] The Board found that the employer's evidence of pre-work alcohol consumption did not prove that the employee was "under the influence" while at work so as to justify his discharge for "misconduct."[102] The Board specifically found that there was no evidence that the employee's "control of his facilities" was impaired by his on-duty alcohol intoxication.[103]

E. Collective Bargaining Issues

Private sector employers whose employees are represented by a union face the prospect of having employees who are discharged on the basis

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[97]*See* Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 671 (Ind. Ct. App. 1984); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975). *But see* Buethe v. Britt Airlines, Inc., 787 F.2d 1194, 1197 (7th Cir. 1986) (court recognized the tort of wrongful discharge "in retaliation for exercising a statutory right or performing a statutory duty").

[98]*See, e.g.*, Pelizza v. Reader's Digest Sales & Serv., 624 F. Supp. 806 (N.D. Ill. 1985); Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33 (Minn. Ct. App. 1986).

[99]*See, e.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employee discharged without a hearing in violation of the employer's dispute resolution procedures was found to state a cause of action for wrongful discharge); *see also* King v. Electronic Data Sys. Corp., No. 17039 (Mont. Co. Cir. Ct. Aug. 14, 1986), where an AIDS victim is suing his employer for wrongful termination on the theory that the company's employment manual created an "employment contract" which was violated when he was discharged on account of his illness.

[100]For example, in Jacobs v. California Unemployment Ins. Appeals Bd., 25 Cal. App. 3d 1035, 1039, 102 Cal. Rptr. 364, 367-68 (1972), an employee's excessive absenteeism caused by alcoholism was held to be "non-volitional." However, the state of Oregon has recently adopted a policy which cuts off unemployment benefits to persons seeking work who refuse to submit to drug tests required by prospective employers or who are fired for refusing to submit to drug tests ordered by employers for reasonable cause. Daily Labor Report (BNA) No. 183, Sept. 22, 1986, at A8.

[101]Alcoa v. Review Bd. of Ind. Employ. Sec. Div., 426 N.E.2d 54 (Ind. Ct. App. 1981).

[102]*Id.* at 60.

[103]*Id.*

of medical test results grieve the appropriateness of such discipline. Frequently, such cases are taken to labor arbitration. In general, arbitrators require proof of a reasonably discernible connection between an employee's off-duty activities and the employer's business interests when upholding disciplinary penalties.[104] This is especially critical in drug or alcohol-related cases, where the activities of the employee under scrutiny may have occurred long before he reported to work. For example, in *CFS Continental, Inc.*,[105] an employer's discipline, based solely upon a positive test result showing marijuana use, was overturned by Arbitrator Lumbley because that drug test could not distinguish between on-duty and off-duty use and did not conclusively show that the employee had used marijuana *while on the job*.[106] Moreover, in *Boone Energy*,[107] Arbitrator O'Connell reinstated eight of ten employees who were discharged after testing positive for drugs, finding that these tests merely indicated *past* exposure to drugs and did not establish that the employees were under the influence of drugs at the time the test samples were taken.[108]

The continued applicability of these on-duty/off-duty principles may arguably be in question as a result of the recent Fifth Circuit Court of Appeals decision in *MISCO v. United Paperworkers International Union*.[109] In *MISCO*, an arbitrator reinstated an employee who had been

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[104]Furthermore, an employer's work rule prohibiting employee drug use must be "reasonable" on its face in order to survive arbitral scrutiny. *See* Henry Vogt Mach. Co., Am. Arb. Ass'n Report 333.3, Dec. 15, 1986, at 4; Schien Body & Equip. Co., Inc., 69 Lab. Arb. (BNA) 930, 935-36 (1977) (Roberts, Arb.).

[105]CFS Continental, Inc. and Teamsters, Local Union No. 117, Driver Sales & Warehouse, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.). *But see* Union Oil of Cal., 87 Lab. Arb. (BNA) 297 (1985) (Boner, Arb.); Indianapolis Power & Light Co. and Electrical Workers (IBEW), Local 1395, 86-2 Lab. Arb. Awards (CCH) ¶ 8507 (May 9, 1986) (Arbitrator Volz upheld the discharge of an employee who had tested positive for illegal drug use despite union contentions that the employee had not possessed or used drugs while on the employer's time or property and that the employee's off-duty use of marijuana had not impaired his work performance). *See also* Police Dep't and Grievant, 87-1 Lab. Arb. Awards (CCH) ¶ 8035 (July 26, 1986) (Riker, Arb.).

[106]86-1 Lab. Arb. Awards (CCH) at ¶ 8070.

[107]85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.); *see also* Kroger Co. and Bakery, Confectionery & Tobacco Workers, Local 372-A, 86-2 Lab. Arb. Awards (CCH) ¶ 8407 (June 19, 1986) (Wren, Arb.); Weyerhauser Co., 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); Hayes-Albion Corp., 76 Lab. Arb. (BNA) 1005 (1981) (Kahn, Arb.).

[108]85 Lab. Arb. (BNA) at 237.

[109]768 F.2d 739 (5th Cir. 1985), *cert. granted*, 55 U.S.L.W. 3472 (U.S. Jan. 13, 1987) (No. 86-651); *see also* Douglas & Lomason Co. and Aluminum, Brick & Clay Workers, Local 212, 86-1 Lab. Arb. Awards (CCH) ¶ 8027 (1985) (Nicholas, Arb.) (Arbitrator Nicholas held the penalty of discharge for an employee found smoking marijuana on company premises to be consistent with a public policy against allowing employees to operate dangerous machinery while "under the influence," and that such a public policy could not be contravened by arbitral award). *But see* Northwest Airlines, Inc. v. Airline Pilots Ass'n, No. 85-6228 (D.C. Cir. Jan. 6, 1987) (slip opinion), where the District of Columbia Circuit Court of Appeals reversed a lower court's decision that the enforcement of an arbitration award ordering the reinstatement of an airline pilot who had violated

discharged after being found on company premises in another employee's car which was filled with marijuana smoke and in which marijuana was found. The district court vacated the arbitrator's decision, finding that it was contrary to a well-defined public policy against the operation of dangerous machinery by persons under the influence of drugs, and the court of appeals affirmed.[110] Whether courts in general will recognize a "well-defined" public policy against alcohol or drug use remains to be seen.

Employers must also be aware that arbitrators have been wary of upholding an employee discharge based solely upon the results of a single medical test, because drug testing procedures are not error-free.[111] An arbitrator will often resolve all doubts about the accuracy of such a test in the employee's favor and may require the employer to meet stricter standards of proof in this type of case. For example, in *Pacific Motor Trucking*,[112] Arbitrator D'Spain found a discharge based upon the results of a blood alcohol test showing that an employee had a blood-alcohol level of 0.19% to be improper.[113] Arbitrator D'Spain discounted the results of this test because the medical laboratory report pertaining to it did not verify the date on which the lab had received the employee's blood specimen and because "chain of possession" doc-

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a company rule against consuming alcohol within twenty-four hours of duty, but who had subsequently completed an alcohol treatment program, would jeopardize public safety and be inconsistent with public policy. The Court of Appeals ruled that if the pilot could obtain FAA recertification, the enforcement of this arbitration award would not violate public policy. *Id. See also* Premium Bldg. Prod. Co. v. United Steelworkers, 616 F. Supp. 512 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) (in refusing to vacate an arbitration award that reinstated an employee who had been caught smoking marijuana, district court held that public policy does *not* require, in all cases, that employees caught smoking marijuana in the work place be discharged).

[110]*Misco*, 768 F.2d at 740.

[111]*See, e.g.*, Chase Bag Co. and Amalgamated Clothing and Textile Workers Union, Local 377T, 87-1 Lab. Arb. Awards (CCH) ¶ 8001 (May 24, 1986) (Strasshofer, Arb.); Georgia-Pacific Corp. and United Paperworkers Int'l Union, Local Union No. 335, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (April 7, 1985) (Clarke, Arb.).

For this reason, an employer's selection of a clinical testing laboratory is all important. Regretfully, Indiana does not require certification or state-approval for clinical laboratories. *Cf.* IND. CODE ANN. § 20-12-34-5 (West 1984). *But see* 42 U.S.C.S. § 263(a) (Law. Co-op. 1978) (requiring federal licensure of clinical laboratories engaged in interstate commerce); 21 C.F.R. §§ 600-680 (1986). *See generally* Wall St. J., Feb. 2, 1987, at 1, col. 6.

[112]86 Lab. Arb. (BNA) 497 (1986) (D'Spain, Arb.); *see also* Georgia-Pacific Corp., 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.). However, when adverse test results are combined with other indicia of improper employee alcohol or drug use, arbitrators are more likely to uphold disciplinary actions taken against such employees. *See* Dixie Container Corp. and United Paperworkers Int'l Union, Local 699, 86-2 Lab. Arb. Awards (CCH) ¶ 8599 (Oct. 23, 1986) (Fishgold, Arb.); Rohr Indus., Inc. and International Ass'n of Mach., Local Lodge 964, 86-2 Lab. Arb. Awards (CCH) ¶ 8389 (Mar. 11, 1986) (Hardbeck, Arb.); Georgia Power Co., 87 Lab. Arb. (BNA) 800 (1986) (Byars, Arb.); Tennessee River Pulp & Paper Co., 68 Lab. Arb. (BNA) 421 (1976) (Simon, Arb.).

[113]86 Lab. Arb. (BNA) at 498.

umentation was not kept on that specimen.[114] Moreover, in *Pacific Bell*,[115] Arbitrator Schubert required an employer to prove that a discharged employee had used illegal drugs by "clear and convincing evidence" rather than by the normal "preponderance of the evidence" arbitral standard of proof.[116]

Furthermore, when an employer has an employee assistance counseling program in operation, arbitrators have generally found a discharge based upon substance abuse to be improper unless the employee has had an opportunity to participate in that rehabilitation program.[117] However, in *Rohr Industries, Inc.*,[118] Arbitrator Hardbeck upheld the discharge of an employee who had tested positive for PCP where the employee knew about yet failed to avail himself of an existing employer-sponsored employee assistance program.[119]

IV. Conclusion

The private sector employer in Indiana must combat both the fact of increasing substance abuse and the fear of a spreading AIDS epidemic.

It would appear that the only legal limitations placed upon a non-unionized private sector employer wishing to implement a workplace medical testing program involve the methodology used. Such an employer must carefully design its medical testing program so as to preclude both the "governmental entanglement" which brings constitutional restrictions into play and the unexpected, unreasonable, or unnecessary actions of its testing agents which give rise to common law actions in tort.

A unionized employer has an additional responsibility. It must bargain in good faith with the union representing its employees over the promulgation and implementation of such a medical testing program, unless the right to implement such a program unilaterally has been contractually retained by management or the union has waived its right to bargain over this issue.

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[114]*Id.*

[115]87 Lab. Arb. (BNA) 313 (1986) (Schubert, Arb.). *But see* Roadway Express, 87 Lab. Arb. (BNA) 224 (1986) (Cooper, Arb.) (Arbitrator Cooper found that public safety considerations warranted the use of the lesser "preponderance of the evidence" standard of proof in a case involving the discharge of a truck driver based upon the positive results of a drug screening test).

[116]87 Lab. Arb. (BNA) at 315-16.

[117]*See, e.g.*, Indianapolis Rubber Co., 79 Lab. Arb. (BNA) 529 (1982) (Gibson, Arb.); Kerr-McGee Ref. Corp. and Oil, Chem. & Atomic Workers, Local 4-245, 86-2 Lab. Arb. Awards (CCH) ¶ 8454 (July 2, 1986) (Caraway, Arb.).

[118]Rohr Indus., Inc. and International Ass'n of Mach., Local Lodge 964, 86-2 Lab. Arb. Awards (CCH) ¶ 8389 (Mar. 11, 1986) (Hardbeck, Arb.); *see also* United Food & Commercial Workers Local 115 and Lick Fish & Poultry, Case No. 08-29-86 (1986) (Arbitrator Concepcion upheld the discharge of an employee who reported for work under the influence of an illegal drug despite a union plea for rehabilitation in lieu of discharge).

[119]86-2 Lab. Arb. Awards (CCH) at ¶ 8389.

The private sector non-unionized employer's use of the results obtained from its substance abuse testing program in making employment decisions is also generally limited only by methodological concerns. An employer's testing program must be designed to insure that there will be no negligent or premature disclosure of test results and must require confirmational testing of any initially positive test results prior to the initiation of any adverse employment actions. Furthermore, where a person testing positive for substance abuse is found to be an alcoholic or drug addict protected as a "handicapped individual" under federal or state law, the employer must be prepared to show, as a condition precedent to the imposition of adverse employment actions, that such substance abuse has prevented that person from performing his job duties. A unionized employer faces the added responsibility of establishing a connection between an employee's substance abuse and the employer's business relationship in order to have a disciplinary action taken against such an employee upheld in the arbitral forum.

In contrast, because of the protected "handicapped" status afforded AIDS victims under most applicable federal and state laws, test results showing that an employee or job applicant is infected with the AIDS virus will be legally useless to an employer unless they are accompanied by proof that such person is unable to perform his job duties because of AIDS. For this reason, it would appear that AIDS screening tests are, for the most part, unwarranted in the private sector workplace.

In accordance with the current state of the law as it impacts on workplace medical testing programs, it is suggested that a private sector employer in Indiana should:

1. Establish and publicize a clearly written "no-alcohol, no-drugs" policy.

2. Negotiate, if necessary, a broad management rights clause and specific language in its collective bargaining agreement giving management the right to conduct employee medical testing. Negotiate with the union concerning this substance abuse policy and testing program as required by law.

3. Provide each employee and job applicant with a medical testing consent form which defines the purpose and scope of the company's medical testing program and which gives notice that an adverse test result will lead to disciplinary punishment up to and including discharge.

4. Establish a scientifically accurate medical testing program that does not involve public law enforcement personnel.

5. Limit testing to job applicants, regularly scheduled employee physical examinations, and instances where there exists a "reasonable suspicion" of on-duty employee performance impairment as a result of alcohol or drug use.

6. Require that medical testing be done privately and respectfully.

7. Establish strict "chain of custody" procedures for the collection and retention of test samples.

8. Make absolutely certain that the fact of testing and test results are kept confidential and placed in a file separate from regular employee personnel files.

9. Require initial adverse test results to be confirmed by a second independent analysis.

10. Establish and publicize the existence of a sound and thoughtful substance abuse rehabilitation service or employee assistance program.

11. Be consistent in the application of the testing program and the discipline imposed thereunder.

12. Train supervisors to recognize an employee under the influence of alcohol or drugs and to gather and record all relevant evidence available that may establish that employee's performance impairment independent of medical test results.

13. Review current personnel policies and insurance programs to determine whether changes are necessary to address the AIDS issue before it actually arises in the workplace.

14. Establish an employer-sponsored AIDS education program to answer questions and calm fears about this medical problem in lieu of conducting medical tests to detect the AIDS virus.

Indiana's Living Wills and Life-Prolonging Procedures Act: A Reform Proposal

Carol Ann Mooney*

Indiana's Living Wills and Life-Prolonging Procedures Act[1] (Indiana Act) became effective September 1, 1985. The law articulates[2] the right of persons who are at least eighteen years old to execute a document that contains directions concerning the signer's medical treatment.[3] The document becomes operative only if the signer becomes terminally ill and incompetent to participate in decisions concerning his treatment.[4] Thirty-five other states, including the District of Columbia, have enacted living will statutes.[5] Part I of this Article provides an overview of the legislation adopted in the other states. Parts II and III outline the provisions of the Indiana Act and discuss the problems that are likely

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[1]Ind. Code Ann. §§ 16-8-11-1 to -22 (West Supp. 1986). For a general discussion of the Indiana Act, see Kolb, *Indiana's Living Will and Life Prolonging Procedures Act*, 19 Ind. L. Rev. 285 (1986).

[2]The verb "articulates" is used rather than "grants" because it is arguable that such a right exists even without legislation. *See* Paris & McCormick, *Living-Will Legislation, Reconsidered*, America, Sept. 5, 1981, at 86, 87. The North Carolina living will statute establishes a "nonexclusive procedure" by which a patient can exercise his right to control the decisions relating to his own medical care. N.C. Gen. Stat. § 90-320 (1985). Legislation, however, makes clear the legal implications of the exercise of such a right.

[3]Ind. Code Ann. § 16-8-11-11 (West Supp. 1986).

[4]*Id.* § 16-8-11-12(b), (c).

[5]The following is a list of the state statutes authorizing the use of living wills: Ala. Code §§ 22-8A-1 to -10 (1984); Ariz. Rev. Stat. Ann. §§ 36-3201 to -3210 (1986); Ark. Stat. Ann. §§ 82-3801 to -3804 (Supp. 1985); Cal. Health & Safety Code §§ 7185-7195 (West Supp. 1987); Colo. Rev. Stat. §§ 15-18-101 to -113 (Supp. 1986); Conn. Death with Dignity Act, Pub. Act No. 85-606, 1986 Conn. Legis. Serv. 541-542 (West); Del. Code Ann. tit. 16, §§ 2501-2509 (1983); D.C. Code Ann. §§ 6-2421 to -2430 (Supp. 1986); Fla. Stat. Ann. §§ 765.01-.15 (West 1986); Ga. Code Ann. §§ 88-4101 to -4112 (Harrison 1986); Idaho Code §§ 39-4501 to -4508 (1985 & Supp. 1986); Ill. Ann. Stat. ch. 110-1/2, paras. 701-710 (Smith-Hurd Supp. 1986); Ind. Code Ann. §§ 16-8-11-1 to -22 (West Supp. 1986); Iowa Code Ann. §§ 144A.1-.11 (West Supp. 1986); Kan. Stat. Ann. §§ 65-28,101 to -28,109 (1986); La. Rev. Stat. Ann. §§ 40:1229.58.1-.10 (West Supp. 1987); Me. Rev. Stat. Ann. tit. 22, §§ 2921-2931 (Supp. 1986); Md. Health-Gen. Code Ann. §§ 5-601 to -614 (Supp. 1986); Miss. Code Ann. §§ 41-41-101 to -121 (Supp. 1986); Mo. Ann. Stat. §§ 459.010-.055 (Vernon Supp. 1987); Mont. Code Ann. §§ 50-9-101 to -206 (1985); Nev. Rev. Stat. §§ 449.540-.690 (1985); N.H. Rev. Stat. Ann. §§ 137-H:1 to -H:16 (Supp. 1986); N.M. Stat. Ann. §§ 24-7-2 to -10 (1986); N.C. Gen Stat. §§ 90-320 to -323 (1985); Okla. Stat. Ann. tit. 63, §§ 3101-3111 (West Supp. 1987); Or. Rev. Stat. §§ 97.050-.090 (1984); Tenn. Code Ann. §§ 32-11-101 to -110 (Supp. 1985); Tex. Rev. Civ. Stat. Ann. art. 4590h, §§ 1-11 (Vernon Supp. 1986); Utah Code Ann. §§ 75-2-1101 to -1118 (Supp. 1986); Vt. Stat. Ann. tit. 18, §§ 5251-5262 (Supp. 1986); Va. Code Ann. §§ 54-325.8:1 to :12 (Supp. 1986); Wash. Rev. Code Ann. §§ 70.122.010-.905 (Supp. 1987); W. Va. Code §§ 16-30-1 to -10 (1985); Wis. Stat. Ann. §§ 154.01-.15 (West Supp. 1986); Wyo. Stat. §§ 33-26-144 to -152 (Supp. 1986).

to arise from its implementation. Part IV recommends that the Indiana legislature repeal the Indiana Act and replace it with the Uniform Rights of the Terminally Ill Act (Uniform Act), adopted by the National Conference of Commissioners on Uniform Laws in August 1985.[6]

I. Overview of Living Wills Legislation

Generally speaking, a living will is a written document signed by a competent adult that states that if the signer becomes terminally ill and incompetent to participate in decisions concerning his medical treatment, life-sustaining procedures should not be used to postpone his death.[7] Living will statutes ordinarily allow physicians and other health care providers to withhold or withdraw life-sustaining medical care under specified circumstances on the basis of the patient's living will, without prior court approval and without adverse legal consequences. The purpose of such documents is to protect the individual's right to be free from unwanted medical treatment, a right based upon both the common law right to bodily integrity[8] and the constitutional right to privacy.[9]

The term "living will" was first used in 1969 by Luis Kutner.[10] He used the term to describe a document that could be used not only to

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[6]Unif. Rights of the Terminally Ill Act §§ 1-18, 9A U.L.A. 455-64 (1985) [hereinafter Uniform Act].

[7]*See generally* Horan, *The "Right to Die": Legislative and Judicial Developments*, Linacre Q., Feb. 1979, at 57; Kutner, *The Living Will: Coping with the Historical Event of Death*, 27 Baylor L. Rev. 39 (1975); Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 Ind. L.J. 539 (1969) [hereinafter Kutner, *Due Process*]; Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 Neb. L. Rev. 779 (1984); Raible, *The Right to Refuse Treatment and Natural Death Legislation*, Medicolegal News, Fall 1977, at 6; Note, *The "Living Will": The Right to Death with Dignity?*, 26 Case W. Res. L. Rev. 485 (1976); Note, *Rejection of Extraordinary Medical Care by a Terminal Patient: A Proposed Living Will Statute*, 64 Iowa L. Rev. 573 (1979); Note, *In re Living Will*, 5 Nova L.J. 445 (1981); Note, *The Right to Die a Natural Death and the Living Will*, 13 Tex. Tech. L. Rev. 99 (1982); Note, *The Right to Die: A Proposal for Natural Death Legislation*, 49 U. Cin. L. Rev. 228 (1980); Comment, *The Living Will: Already a Practical Alternative*, 55 Tex. L. Rev. 665 (1977).

[8]The common law right to bodily integrity is a right to be free from unwanted bodily contact. *See* Natanson v. Kline, 186 Kan. 393, 406-08, 350 P.2d 1093, 1104 (1960); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). This common law of right is the basis for the doctrine of informed consent, *see* Plante, *An Analysis of "Informed Consent"*, 36 Fordham L. Rev. 639, 640-48 (1968), and its logical corollary, the right to refuse treatment.

[9]The constitutional right to privacy is a right to be free from governmental interference in fundamental matters, i.e. a right of self-determination. The right to privacy, interpreted more broadly than seclusion or secrecy, was first announced by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 197. The right was later expanded in Roe v. Wade, 410 U.S. 113 (1973). The first case to extend the right of privacy to decisions to forgo medical care was *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

[10]*See* Kutner, *Due Process*, *supra* note 7, at 551.

direct the withholding of life-sustaining procedures from terminally ill patients, but that also could be used by a Christian Scientist to refuse all medical treatment or by a Jehovah's Witness to prohibit blood transfusions.[11]

It was not until 1976, with *In re Quinlan*[12] as an impetus, that California became the first state to enact living will legislation. The California Act,[13] which has since served as a model for legislation in several other states, has a significantly narrower operating sphere than that contemplated by Mr. Kutner. The law gives legal effect to a private medical directive signed by a competent adult and witnessed by two persons who have no special interest in the patient's estate.[14] The directive, the form for which is set forth in the statute,[15] states that life-sustaining procedures are to be withheld or withdrawn if the declarant is affected with a terminal condition and his death is imminent whether or not life-sustaining procedures are utilized.[16] Because technological advances make it possible to sustain most lives indefinitely, the requirement that death be imminent even if life-sustaining procedures are used severely restricts the utility of the act.[17] Furthermore, life-sustaining procedures are narrowly defined as mechanical or artificial means to sustain, restore, or supplant a vital function that serve only to prolong the moment of death.[18] Medication is specifically excluded from the statute along with all procedures necessary to alleviate pain.[19]

In addition to having a relatively narrow scope, the California Act provides that a living will is not binding upon the patient's physician unless it is executed or reexecuted at least fourteen days after the patient is diagnosed as being in a terminal condition.[20] If executed before the expiration of the required waiting period, the directive may or may not be followed at the physician's option.[21] In any event, a directive is effective for only five years, at the end of which it must be reexecuted.[22] The statute grants immunity from civil or criminal liability to any licensed

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[11]*Id.*

[12]70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

[13]CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1987).

[14]*Id.* § 7188.

[15]*Id.*

[16]*Id.*

[17]Such provisions have been criticized as prohibiting the applicability of living wills to the very situations they are designed to address. *See generally* PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, A REPORT ON THE ETHICAL, MEDICAL, AND LEGAL ISSUES IN TREATMENT DECISIONS, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 142 (March 1983) [hereinafter DECIDING TO FOREGO].

[18]CAL. HEALTH & SAFETY CODE § 7187(c) (West Supp. 1987).

[19]*Id.*

[20]*Id.* § 7191.

[21]*Id.* § 7191(c).

[22]*Id.* § 7189.5.

health care professional who complies with a properly executed directive,[23] but the physician is left with the burden of determining whether the document was properly executed.[24] If the directive is binding rather than optional, a physician's failure to withdraw treatment, or to transfer the patient to another physician willing to do so, constitutes unprofessional conduct.[25]

In addition to the above core provisions, the California Act contains a number of important clarifying provisions:

1. The Act shall not be taken to condone mercy killing or to permit any affirmative act or deliberate omission to end life other than to permit the natural process of dying.[26]
2. The Act is not intended to supersede any existing right to withdraw or withhold life-sustaining procedures in any lawful manner.[27]
3. The directive is not effective if the declarant is pregnant.[28]
4. Withholding treatment in accordance with a directive shall not be considered suicide.[29]
5. Making a directive shall not inhibit procuring a life insurance policy, nor can anyone be forced to sign a directive as a prerequisite to obtaining medical insurance.[30]

Several of the living will statutes in the thirty-five remaining jurisdictions[31] were modeled after the California Act.[32] There are, however, significant differences in the statutes regarding the type of treatment

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[23]*Id.* § 7190.

[24]*Id.* § 7191(a).

[25]*Id.* § 7191(b). However, the physician may not be held criminally or civilly liable for failure to follow the directive. A charge of unprofessional conduct is the only sanction available. *Id.*

[26]*Id.* § 7195.

[27]*Id.* § 7193.

[28]*Id.* § 7188.

[29]*Id.* § 7192(a).

[30]*Id.* § 7192(b), (c).

[31]For a list of all such statutes, see *supra* note 5.

[32]Some of the statutes modeled after the California Act contain distinctions. For instance, Texas has a California-type statute, TEX. REV. CIV. STAT. ANN art. 4590h, §§ 1-11 (Vernon Supp. 1986), but it contains no requirement that a directive be reexecuted every five years. *Id.* § 5. Since most statutes contain liberal revocation provisions, such a requirement is generally thought unnecessary.

Washington also has a California-type statute, WASH. REV. CODE ANN. § 70.122 (Supp. 1987), but the directive's effectiveness does not depend upon its being executed after a diagnosis of a terminal illness. *Id.* § 70.122.060(2). Nevada's statute, NEV. REV. STAT. §§ 449.540-.690 (1985), also tracks the California law, but physicians are never legally bound by the directive. *Id.* § 449.640.

that may be withdrawn[33] and how serious the patient's condition must be before the directive becomes operative.[34] For example, in Kansas, a

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[33]Most statutes cover "life-sustaining" or "life-prolonging" procedures. *See* ALA. CODE § 22-8A-4 (1984); ARIZ. REV. STAT. ANN. § 36-3202 (1986); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1987); COLO. REV. STAT. § 15-18-104 (Supp. 1986); D.C. CODE ANN. § 6-2422 (Supp. 1986); FLA. STAT. ANN. § 765.04 (West 1986); GA. CODE ANN. § 88-4103 (Harrison Supp. 1986); IDAHO CODE § 39-4504 (1985 & Supp. 1986); ILL. ANN. STAT. ch. 110-1/2, para. 703 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 16-8-11-12 (West Supp. 1986); IOWA CODE ANN. § 144A.3 (West Supp. 1986); KAN. STAT. ANN. § 65-28,103 (1985); LA. REV. STAT. ANN. § 40:1299.58.1(A)(1)-(2) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 2922 (Supp. 1986); MD. HEALTH-GEN. CODE ANN. § 5-602 (Supp. 1986); MISS. CODE ANN. § 41-41-103 (Supp. 1986) (life-sustaining mechanisms are defined as extraordinary techniques); MONT. CODE ANN. § 50-9-103 (1985); NEV. REV. STAT. § 449.600 (1985); N.H. REV. STAT. ANN. § 137-H:3 (Supp. 1986); OKLA. STAT. ANN. tit. 63, § 3103 (West Supp. 1987); OR. REV. STAT. § 97.055 (1984); TEX. REV. CIV. STAT. ANN. art. 4590h, § 3 (Vernon Supp. 1986); UTAH CODE ANN. § 75-2-1104 (Supp. 1986); VA. CODE ANN. § 54-325.8:3 (Supp. 1986); WASH. REV. CODE ANN. § 70.122.030 (Supp. 1987); W. VA. CODE § 16-30-3 (1985); WIS. STAT. ANN. § 154.03 (West Supp. 1986); WYO. STAT. § 33-26-145 (Supp. 1986).

Two statutes limit their scope to "extraordinary" treatment. *See* N.C. GEN. STAT. § 90-321 (1985); VT. STAT. ANN. tit. 18, § 5253 (Supp. 1985). In contrast, Arkansas permits a declaration to direct withholding or discontinuance of "artificial, extraordinary, extreme or radical medical or surgical means or procedures calculated to prolong life." ARK. STAT. ANN. § 82-3802 (Supp. 1985). Tennessee authorizes a declaration directing the withholding or withdrawal of "medical care," which is broadly defined. TENN. CODE ANN. §§ 32-11-103(5), -104 (Supp. 1985).

[34]Most living wills are effective only if the patient is certified by his physician to be in a terminal condition and/or the patient's death is "imminent" or expected "within a short time." *See* ALA. CODE §§ 22-8A-3(6), -4(a) (1984); ARIZ. REV. STAT. ANN. § 36-3202 (1986); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1987); COLO. REV. STAT. § 15-18-104 (Supp. 1986); Conn. Death with Dignity Act, Pub. Act No. 85-606, § 2, 1986 Conn. Legis. Serv. 541 (West); DEL. CODE ANN. tit. 16, § 2503 (1983); D.C. CODE ANN. § 6-2422 (Supp. 1986); FLA. STAT. ANN. §§ 765.03(6), .04(1) (West 1986); GA. CODE ANN. § 88-4103 (Harrison Supp. 1986); IDAHO CODE § 39-4504 (Supp. 1986); ILL. ANN. STAT. ch. 110-1/2, paras. 702(f), 703 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 16-8-11-12(b) (West Supp. 1986); IOWA CODE ANN. § 144A.3 (West Supp. 1986); KAN. STAT. ANN. § 65-28,103 (1986); LA. REV. STAT. ANN. § 40:1299.58.3(A)(1) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, §§ 2921-2922 (Supp. 1986); MD. HEALTH-GEN. CODE ANN. §§ 5-601(g), -602 (Supp. 1986); MISS. CODE ANN. §§ 41-41-107, -113 (Supp. 1986); MO. ANN. STAT. §§ 459.010(6), -.015(3) (Vernon Supp. 1987); MONT. CODE ANN. §§ 50-9-102(7), -103 (1985); NEV. REV. STAT. §§ 449.600, .610 (1985); N.H. REV. STAT. ANN. §§ 137-H:2 (III), -H:3 (Supp. 1986); N. M. STAT. ANN. § 24-7-3 (1986); N.C. GEN. STAT. § 90-321 (1985); OKLA. STAT. ANN. tit. 63, §§ 3102(H), 3103(A) (West Supp. 1987); OR. REV. STAT. §§ 97.050(5), .055(1) (1984); TENN. CODE ANN. § 32-11-105 (Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 4590h, § 3 (Vernon Supp. 1986); UTAH CODE ANN. § 75-2-1104(4) (Supp. 1986); VT. STAT. ANN. tit. 18, § 5253 (Supp. 1986); VA. CODE ANN. §§ 54-325.8:2, :3 (Supp. 1986); WASH. REV. CODE ANN. § 70.122.020(4), .030 (Supp. 1987); W. VA. CODE § 16-30-3 (1985); WIS. STAT. ANN. § 154.03 (West Supp. 1986); WYO. STAT. §§ 33-26-144(vi), -145 (Supp. 1986).

But see ARK. STAT. ANN. § 82-3801 to -3803 (Supp. 1986) (no requirement of terminal illness or imminent death); UTAH CODE ANN. § 75-2-1105 (Supp. 1986) (authorizing a directive executed after incurring an injury, disease, or illness; effectiveness of such a directive is not conditional upon declarant being in a terminal condition or upon death

living will operates when the patient is in a terminal condition, but there is no requirement that death be imminent.[35] In New Mexico, a declaration may request that all maintenance medical treatment (as opposed to life-sustaining procedures) be withheld.[36] Maintenance medical treatment is basically defined as all treatment designed solely to sustain the life process.[37] It might therefore include medication, intravenous hydration, and nasogastric tube feedings—treatment that is implicitly or explicitly excluded from the coverage of many acts. The New Mexico Act also allows family members to execute a living will on behalf of a terminally ill minor.[38] In 1984, New Mexico extended the scope of its statute to include irreversibly comatose persons in addition to those who are terminally ill.[39]

Arkansas has perhaps the most broadly applicable statute.[40] It comes close to saying that anyone[41] can refuse any type of treatment ("artificial, extraordinary, extreme or radical medical or surgical means or procedures calculated to prolong his life").[42] The Arkansas Act also allows declarations to be prepared on behalf of minors and incompetent adults.[43] Given the fact that the document may be prepared by someone other than the patient and may cover a broad range of treatments, the law arguably authorizes involuntary euthanasia.

In addition to legitimizing the advance directive, several states authorize a person to name an agent who can make medical decisions on behalf of the patient should the patient become incapable of participating

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being imminent).

However, the statutes define terminal condition in quite different ways. Approximately one-third of the living will statutes define "terminal condition" as an incurable condition which, within reasonable medical judgment, will produce death and which is such that the application of life-sustaining procedures will merely postpone the moment of death.

In a similar vein, several states define a terminal condition as incurable and one which will result in death regardless of the use of medical treatment. *See* DEL. CODE ANN. tit. 16, § 25019(e) (1983); GA. CODE ANN. § 88-4102(10) (Harrison 1986); MD. HEALTH-GEN. CODE ANN. § 5-601 (Supp. 1986); N.M. STAT. ANN. § 24-7-2(f) (1986); TENN. CODE ANN. § 32-11-103(9) (Supp. 1985). In contrast, several other states define a terminal condition as an incurable condition which, without the administration of life-sustaining procedures, will result in death within a short time. *See* ALA. CODE § 22-8A-4 (1984); ARIZ. REV. STAT. ANN. § 36-3201 (1986); IOWA CODE ANN. § 144A.2 (West Supp. 1986); ME. REV. STAT. ANN. tit. 22, § 2921(8) (Supp. 1986); MONT. CODE ANN. § 50-9-102(7) (1985).

[35]KAN. STAT. ANN. § 65-28,103 (1985).

[36]N.M. STAT. ANN. § 24-7-3 (1986).

[37]*Id.* § 24-7-2.C.

[38]*Id.* § 24-7-4. Other statutes also contain such a provision. *See* ARK. STAT. ANN. § 82-3803 (Supp. 1985); LA. REV. STAT. ANN. § 40:1299.58.6 (West Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 4590h, § 4D (Vernon Supp. 1986).

[39]N.M. STAT. ANN. § 24-7-3 (1986).

[40]ARK. STAT. ANN. § 82-3801 to -3803 (Supp. 1985).

[41]*Id.* § 82-3802. The Arkansas statute does not restrict the effectiveness of living wills to terminally ill declarants.

[42]*Id.*

[43]*Id.* § 82-3803.

in treatment decisions.[44] The use of agents has been recommended by several commentators[45] who observe that the imprecise terminology used in most living wills leaves open questions, such as whether the patient's condition makes the declaration operative and whether the proposed treatment is the type that the declarant wished to have withheld. An agent can use his knowledge of the patient's personal desires as well as information about the patient's condition and the risks and benefits of the proposed treatment to formulate a decision on the patient's behalf.[46]

Eleven states permit treatment to be withdrawn from an incompetent patient who has not signed a living will if certain procedures are followed.[47] Generally these provisions allow treatment to be withheld only upon agreement of the patient's physician and a patient surrogate, whether the surrogate be a guardian, an agent, or a close family member.[48]

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[44]*See* DEL. CODE ANN. tit. 16, § 2502(b) (1983); FLA. STAT. ANN. § 765.05(2) (West 1986); IOWA CODE ANN. § 144A.7(1)(a) (West Supp. 1986); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 4590h, § 3(e) (Vernon Supp. 1986); UTAH CODE ANN. § 75-2-1106 (Supp. 1986); VA. CODE ANN. § 54-325.8:4 (Supp. 1986); WYO. STAT. § 33-26-145(d) (Supp. 1986).

In addition, a few states have amended their durable power of attorney statutes specifically to authorize appointment of an attorney-in-fact to make medical decisions. *See* CAL. CIV. CODE § 2430-44 (West Supp. 1987); 20 PA. CONS. STAT. ANN. § 5603(h) (Purdon Supp. 1986).

[45]*See* Martyn & Jacobs, *supra* note 7, at 787, 795-802; Paris & McCormick, *supra* note 7, at 88-89; DECIDING TO FOREGO, *supra* note 17, at 141-51; Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 998-1005 (1984).

[46]Some states limit the agent's authority to situations where the patient is terminally ill and either comatose or otherwise incapable of expressing his own views. *See* FLA. STAT. ANN. § 765.05(2) (West 1986); IOWA CODE ANN. § 144A.7(a) (West Supp. 1986); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 4590h, § 4B (Vernon Supp. 1986); VA. CODE ANN. § 54-325.8:4 (Supp. 1986). Other states do not require that the patient be in a terminal condition before the agent has authority to act. *See* DEL. CODE ANN. tit. 16, § 2502(c) (1983); UTAH CODE ANN. § 75-2-1105 (Supp. 1986); WYO. STAT. § 33-26-145(d) (Supp. 1986). In the latter states, the agent may act on the patient's behalf whenever the patient is incapable of making a decision.

[47]*See* ARK. STAT. ANN. § 82-3803 (Supp. 1985); Conn. Death with Dignity Act, Pub. Act No. 85-606, § 2, 1986 Conn. Legis. Serv. 541, 541-42 (West); FLA. STAT. ANN. § 765.07 (West 1986); IOWA CODE ANN. § 144A.7 (West Supp. 1986); LA. REV. STAT. ANN. § 40:1299.58.5 (West Supp. 1987); N.M. STAT. ANN. § 24-7-8.1 (1986); N.C. GEN. STAT. § 90-322 (1985); OR. REV. STAT. § 97.083(2) (1984); TEX. REV. CIV. STAT. ANN. art. 4590h, § 4C (Vernon Supp. 1986); UTAH CODE ANN. § 75-2-1107 (Supp. 1986); VA. CODE ANN. § 54-325.8:6 (Supp. 1985).

[48]*See* Conn. Death with Dignity Act, Pub. Act No. 85606, § 2, 1986 Conn. Legis. Serv. 541, 541-42 (West); FLA. STAT. ANN. § 765.07 (West 1986); IOWA CODE ANN. § 144A.7 (West Supp. 1986); N.M. STAT. ANN. § 24-7-8.1 (1986); TEX. REV. CIV. STAT. ANN. art. 4590h, § 4C (Vernon Supp. 1986); UTAH CODE ANN. § 75-2-1107 (Supp. 1986); VA. CODE ANN. § 54-325.8:6 (Supp. 1986); *cf.* N.C. GEN. STAT. § 90-322 (1985); OR. REV. STAT. § 97.083 (1984) (both statutes ordinarily require agreement of physician and specified family members or a guardian, but if none of them is available the attending physician acting alone may withhold or discontinue extraordinary treatment). *But see* ARK. STAT. ANN. § 82-3803 (Supp. 1985); LA. REV. STAT. ANN. § 40:1299.58.5(A)(1)-(2) (West Supp. 1987) (living will may be executed on behalf of an incompetent adult by specified

There has been almost no court activity involving living wills. There are only two reported cases, both of which were decided in jurisdictions without living will legislation at the time of the decisions.[49] Both courts stated that a patient's living will is persuasive evidence of the incompetent person's intent and should be given great weight.[50]

The living will laws probably have not had much pragmatic impact because of the restrictive scope of many of the statutes and the problems attendant to determining whether, given the patient's condition, a particular treatment is one that the signer intended to refuse. In enacting the statutes, however, the legislatures have acknowledged what the courts have asserted for years: that people have a right to refuse treatment even if the refusal ultimately leads to their deaths.

II. The Indiana Act

The Indiana Act,[51] like the legislation in other states, allows competent adults to state their desires as to medical treatment should they become terminally ill or injured and unable to communicate their wishes. To do this, one may execute a living will declaration, which expresses a desire to forgo life-sustaining procedures that would merely postpone the moment of death;[52] or, a patient may sign a life-prolonging procedures declaration, which expresses a desire to continue any treatment that may extend life.[53] The statute provides a form for each type of declaration

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family members or a legal guardian; concurrence of the physician is not required).

Oregon permits withdrawal of extraordinary treatment in the absence of a declaration only if the patient's condition is terminal and the patient is comatose with no reasonable possibility that he will return to a cognitive state. *See* Or. Rev. Stat. § 97.083 (1984). New Mexico's procedure is available if the patient is terminally ill *or* in an irreversible coma. N.M. Stat. Ann. § 24-7-8.1 (1986). The remaining states permit life-sustaining procedures to be withdrawn from a terminally ill adult who is incapable of communicating his thoughts for any reason, whether or not the patient is comatose. *See* Conn. Death with Dignity Act, Pub. Act No. 85-606, § 2, 1986 Conn. Legis. Serv. 541, 541-42 (West); Fla. Stat. Ann. § 765.07 (West 1986); Iowa Code Ann. § 144A.7 (West Supp. 1986); La. Rev. Stat. Ann. § 40:1299.58.5(A)(1)-(2) (West Supp. 1987); N.C. Gen. Stat. § 90-322 (1985); Tex. Rev. Civ. Stat. Ann. art. 4590h, § 4C (Vernon Supp. 1986); Utah Code Ann. § 75-2-1107 (Supp. 1986); Va. Code Ann. § 54-325.8:6 (Supp. 1986); *cf.* Ark. Stat. Ann. § 82-3803 (Supp. 1985) (a living will prepared on behalf of an incompetent requires a statement signed by two physicians that extraordinary means would have to be used to prolong life).

[49]John F. Kennedy Memorial Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Saunders v. State, 129 Misc. 2d 45, 492 N.Y.S.2d 510 (Sup. Ct. 1985).

[50]*Bludworth*, 542 So. 2d at 926; *Saunders*, 129 Misc. 2d at 54-55, 492 N.Y.S.2d at 517.

[51]Ind. Code Ann. §§ 16-8-11-1 to -22 (West Supp. 1986).

[52]*Id.* § 16-8-11-12(b).

[53]*Id.* § 16-8-11-12(c). Only two other statutes expressly authorize directions to continue treatment. *See* Ark. Stat. Ann. § 22-3802 (Supp. 1985); Md. Health-Gen. Code Ann. § 5-611 (Supp. 1986). Three other statutes state that a person has a right to instruct a doctor to provide care, but the statutes contain no provision implementing that right. *See* Fla. Stat. Ann. § 765.02 (West 1986); Iowa Code Ann. § 144A.1 (West Supp. 1986); N.H. Rev. Stat. Ann. § 137-H:1 (Supp. 1986).

and, to be effective, all declarations must be substantially in the statutory form.[54] Declarations must be signed by the maker and two disinterested witnesses.[55]

The two types of declarations have different effects. A life-prolonging procedures declaration obligates the physician to use life-prolonging procedures.[56] A living will declaration does not obligate a physician to withhold or withdraw life-prolonging procedures,[57] but the physician is not entirely free to do as he sees fit. If the physician does not wish to follow the living will directive, he must make a reasonable effort to transfer the patient to a physician willing to comply.[58] However, the requirement does not apply if the physician has reason to believe the declaration was not validly executed or there is evidence that the patient no longer intends the declaration to be enforced.[59] In such instances, the physician must attempt to ascertain the patient's wishes and to determine the validity of the declaration.

If the physician follows a living will declaration and withholds or withdraws life-prolonging procedures, the physician is relieved of civil and criminal liability, but only if the patient has a terminal condition and has properly executed the living will.[60]

Either type of declaration may be revoked by its maker by oral expression, destruction of the document, or a signed and dated writing.[61] The statute provides penalties for forging a living will or forging a revocation[62] and provides that disciplinary action may be brought against a physician who fails to comply with the statute.[63] The statute includes a number of statements that attempt to clarify the intent of the statute and its interaction with other bodies of law, for example:

1. The statute shall not be construed to authorize euthanasia.[64]
2. The statute creates "no presumption concerning the intention of a person who has not executed a living will."[65]
3. A death resulting from withdrawal of life-prolonging procedures does not constitute suicide.[66]
4. The act does not impair or supersede any existing legal right

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[54]IND. CODE ANN. § 16-8-11-12 (West Supp. 1986).

[55]*Id.* § 16-8-11-11.

[56]*Id.* § 16-8-11-11(g).

[57]*Id.* § 16-8-11-11(f).

[58]*Id.* § 16-8-11-14(e). Though a physician is excused from honoring the directive if, after reasonable investigation, he is unable to find another doctor willing to honor the document, the meaning of "reasonable investigation" is unclear. *See* Kolb, *supra* note 1, at 293 (recommending that such efforts to transfer the patient be well documented).

[59]IND. CODE ANN. § 16-8-11-14(e)(1) (West Supp. 1986).

[60]*Id.* § 16-8-11-14(c), (d).

[61]*Id.* § 16-8-11-13.

[62]*Id.* §§ 16-8-11-16 and -17.

[63]*Id.* § 16-8-11-22.

[64]*Id.* § 16-8-11-20.

[65]*Id.* § 16-8-11-19.

[66]*Id.* § 16-8-11-18(a).

to withdraw or withhold life-sustaining procedures.[67]

5. The living will of a person diagnosed as pregnant has no effect during the pregnancy.[68]

III. Problems with the Indiana Act

A. Physician's Liability

Under the Indiana Act, the protection of the physician from liability is not as clear as it might be. First, with regard to living will declarations, a physician is relieved of liability only when treatment is withdrawn from a terminally ill patient who has properly executed a living will.[69] Proper execution requires that the patient be at least eighteen years old and of sound mind, and that the patient voluntarily sign and date the declaration in the presence of two competent witnesses who are also at least eighteen years of age. Furthermore, to insure that the witnesses are sufficiently objective, the patient's parent, spouse, or child may not act as a witness, nor may any person who is financially responsible for the patient's medical care. Any person who may be entitled to any part of the patient's estate is also disqualified from acting as a witness.[70]

These requirements are obviously intended to protect the patient, yet they may result in unwanted and unneccessary care if the doctor is uncertain whether the document has been properly executed. Some statutes provide that if the document appears valid on its face and the doctor has no reason to believe that it is invalid, he may assume its validity.[71] The Indiana statute permits the health care provider to presume that the declarant was of sound mind,[72] but it does not create a presumption of valid execution.[73] The doctor is left with the burden of

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[67]*Id.* § 16-8-11-18(e).

[68]*Id.* § 16-8-11-11(d). The statute seems to state that the living will of a pregnant woman has no effect during the pregnancy only if the woman has been diagnosed as pregnant. The statute does not directly address the situation where a woman is pregnant but not so diagnosed. Apparently, the statutory language protects a physician who, unaware of an existing pregnancy, complies with a living will.

[69]*Id.* § 16-8-11-14(c).

[70]*Id.* § 16-8-11-11. The statute fails to specify at what point in time the witness must meet these requirements. As noted by Kolb, *supra* note 1, at 289, a qualified witness might become unqualified if the declarant later names the witness as a beneficiary under his or her will.

[71]*See, e.g.*, Colo. Rev. Stat. § 15-18-110(1) (Supp. 1986); Md. Health-Gen. Code Ann. § 5-606 (Supp. 1986); Or. Rev. Stat. § 97.060 (1984); Utah Code Ann. § 75-2-1113 (Supp. 1986).

[72]Ind. Code Ann. § 16-8-11-15 (West Supp. 1986).

[73]The code section provides:

> If the qualified patient who executed a living will declaration is incompetent at the time of the decision to withhold or withdraw life-prolonging procedures, a living will declaration *executed in accordance with this chapter* is presumed to be valid. For purposes of this chapter, a health care provider may presume in the absence of actual notice to the contrary that the declarant was of sound mind when it was executed.

Id. (emphasis added).

determining whether the witnesses saw the declarant sign, whether they were at least eighteen years of age, whether they may be entitled to some portion of the declarant's estate, etc. In short, the doctor must make legal determinations as well as medical ones.

The statute also requires that the declaration be substantially in the form set forth in the statute.[74] Before the passage of the Act, many people signed living wills prepared by their attorneys or they signed forms distributed by national organizations. Apparently the doctor is also left with the burden of determining whether a document is substantially in the statutory form, another legal judgment.

If the patient has executed a life-prolonging procedures declaration, the physician apparently is exposed to liability unless he keeps the patient alive as long as possible. The statute in section 11(g) says quite plainly that if the patient has executed such a declaration, the physician is obligated to use life-prolonging procedures.[75] It is not clear how this obligation relates to the statement in section 18(d) that "this chapter does not impair or supersede any legal right or responsibility that any person may have to effect the withholding or withdrawal of life-prolonging procedures in any lawful manner."[76] The general consensus is that at some point a patient's condition becomes so hopeless that the doctor has no duty to continue medical treatment, even though it may extend life.[77] Yet, section 11(g) seems to create an obligation to extend life as long as possible, if that is what the patient wishes.

B. Scope of the Act

As is true in many other states, the scope of Indiana's living will statute is rather narrow. First, the definition of life-prolonging procedures specifically excludes nutrition, hydration, and the administration of medication.[78] The statute does not permit an individual to direct that such treatment be withheld if he becomes terminally ill and incompetent—to refuse these treatments, one must remain competent.

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[74]*Id.* § 16-8-11-12.

[75]*Id.* § 16-8-11-11(g).

[76]*Id.* § 16-8-11-18(d).

[77]*See* Barber v. Superior Court, 147 Cal. App. 3d 1006, 1017-18, 195 Cal. Rptr. 484, 491 (1983), which states:

> A physician is authorized under the standards of medical practice to discontinue a form of therapy which in his medical judgment is useless. . . . [I]f the treating physicians have determined that continued use of a respirator is useless, then they may decide to discontinue it without fear of civil or criminal liability. By useless is meant that the continued use of the therapy cannot and does not improve the prognosis for recovery.

(quoting Horan, *Euthanasia and Brain Death: Ethical and Legal Considerations*, 315 ANNALS N.Y. ACAD. SCI. 363, 367 (1978), *as quoted in* DECIDING TO FOREGO, *supra* note 17, at 191 n.50). *See also* Annas, *CPR: When the Best Should Stop*, HASTINGS CENTER REP., Oct. 1982, at 30.

[78]IND. CODE ANN. § 16-8-11-4 (West Supp. 1986).

Second, a living will becomes operative only if death will occur in a fairly short time even if life-prolonging procedures are used. One of the major criticisms of the California Act is that treatment may be withdrawn only when death is imminent, whether or not life-prolonging procedures are used.[79] The Indiana statute appears at first reading to have solved this problem: the sample declaration states that if the signer is in a "terminal condition," life-prolonging procedures should be withdrawn.[80] A terminal condition is defined as one that will cause death "within a short period of time" if life-prolonging procedures are *not* used.[81] However, the section that grants immunity to a physician who withdraws treatment in compliance with a directive provides such immunity only if the patient is a "qualified patient."[82] To be a qualified patient, it must be determined that the patient's death will occur from the terminal condition whether or not life-prolonging procedures are used.[83] In order to conclude that death will occur from the terminal condition rather than from some other condition, death must be expected relatively soon even if life-prolonging procedures are used. If life-prolonging procedures can delay death for a long time, the patient is more likely to die of something other than the terminal condition, for example, pneumonia or cardiac arrest. Thus, unless death from the terminal condition is soon expected regardless of treatment, the doctor cannot certify the patient as a qualified patient. If death is imminent regardless of treatment, there may not be much need for a living will.

The Indiana statute, like many others, attempts to balance two important and competing interests. On the one hand, it attempts to preserve for the incompetent patient a voice in determining the course of his medical care. On the other hand, the statute tries to protect the patient from premature termination of treatment. After all, depriving an incompetent patient of treatment to which he is entitled is one of the greatest injustices that can be done. Unfortunately, the protectionist portions of the statute largely deprive it of any significant utility.

IV. Reform Proposal

In August 1985, after the passage of the Indiana Act, the National Conference of Commissioners on Uniform State Laws approved the Uniform Rights of the Terminally Ill Act (the Uniform Act). The Uniform Act is a model living will statute, the general structure and substance of which are similar to that found in most of the existing legislation.

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[79]*See* Deciding to Forego, *supra* note 17, at 143; Capron, *The Development of Law on Human Death*, 315 Annals N.Y. Acad. Sci. 45, 55 (1978).

[80]Ind. Code Ann. § 16-8-11-12(b) (West Supp. 1986).

[81]*Id.* § 16-8-11-9. This definition is itself problematic. What is a "short period of time"? Is it two years, two months, or two days? *See infra* text accompanying notes 114-15.

[82]Ind. Code Ann. § 16-8-11-14(c) (West Supp. 1986).

[83]*Id.* § 16-8-11-14(a).

A competent person eighteen years of age or older may execute a declaration directing the withholding or withdrawal of life-sustaining procedures if the declarant is in a terminal condition and unable to make treatment decisions.[84] Unlike some of the broader state statutes,[85] the Uniform Act does not authorize execution of such declarations on behalf of minors or incompetent adults. It also does not provide for appointment of an agent to make medical decisions, nor does it address treatment of persons who have not executed a declaration.[86]

The Uniform Act streamlines the procedures for execution and revocation of a living will. Proper execution simply requires that the declaration be signed by the declarant or another person at the declarant's direction, and that the signing be witnessed by two persons.[87] The Uniform Act does not require that the witnesses meet any specific qualifications. In contrast, most state statutes,[88] including Indiana's,[89] state that the witnesses cannot be related to the declarant by blood or marriage and

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[84]UNIFORM ACT § 2, 9A U.L.A. 455, 458 (1985).

[85]*See supra* notes 38, 43, 44, 47 and accompanying text.

[86]The omission from the Uniform Act of such provisions was intentional. *See* UNIFORM ACT Prefatory Note, 9A U.L.A. 455, 455 (1985). The narrow scope of the Uniform Act apparently was chosen to encourage its widespread adoption. Like the Uniform Act, the Indiana Act does not authorize execution of a declaration on behalf of minors or incompetent adults, nor does it contain a provision regarding treatment of persons who have not executed a declaration. The Indiana Act, however, does implicitly recognize a patient's right to appoint an attorney-in-fact to make treatment decisions on behalf of the terminally ill patient.

The Indiana Act does not explicitly authorize the appointment of agents to make medical treatment decisions. If a physician doubts the validity of a patient's living will, however, the statute directs the physician to consult certain persons to ascertain the patient's intention. *See supra* note 59 and accompanying text. The physician is directed to consult first the patient's legal guardian, if any, and second, "[t]he person or persons designated by the patient in writing to make the treatment decision for the patient should the patient be diagnosed as suffering from a terminal condition." IND. CODE ANN. § 16-8-11-14(g)(2) (West Supp. 1986). That provision implicitly recognizes the patient's ability to make such a designation.

If the Indiana legislature adopts the Uniform Act but wishes to authorize the use of agents to make medical decisions, the legislature could amend the state's durable power of attorney statute to authorize specifically the use of an attorney-in-fact to make medical decisions.

[87]UNIFORM ACT § 2(a), 9A U.L.A. 455, 458 (1985). The Uniform Act unfortunately is unclear about whether the witnesses must actually see the declarant sign the document or whether the declarant's acknowledgment of his signature to the witnesses is sufficient. The comment following section 2 states that the declaration is to be signed by the declarant in the presence of the witnesses, but the actual language of the act is not explicit. Section 2(a) states: "The declaration must be signed by the declarant or another at the declarant's direction, and witnessed by 2 individuals." *Id.* The ambiguity could be eliminated by providing: "The declaration must be signed by the declarant, or another at the declarant's direction, in the presence of two persons each of whom must also sign as a witness."

[88]*See, e.g.*, ALA. CODE § 22-8A-4 (1984); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1987); GA. CODE ANN. § 88-4103 (Harrison Supp. 1986); MISS. CODE ANN. § 41-41-111 (Supp. 1986); UTAH CODE ANN. § 75-2-1104 (Supp. 1986).

[89]IND. CODE ANN. § 16-8-11-11 (West Supp. 1986).

that the witnesses cannot be entitled to any part of the declarant's estate either under the state intestacy laws or under the declarant's will. The drafters of the Uniform Act believe that whatever protection is afforded the patient by the more elaborate witness procedures can be provided by established hospital procedures[90] without unduly burdening both patients and physicians with complicated execution requirements.[91]

The Uniform Act provides that a declaration may be revoked in any manner by which the declarant is able to communicate an intent to revoke.[92] To be effective, of course, the revocation must be communicated to the health care provider.[93] This is in sharp contrast to the Indiana provision,[94] and to virtually all other state statutes,[95] which list specific means by which a declaration can be revoked: a signed, dated writing; physical cancellation or destruction; or oral expression of intent to revoke. The Uniform Act's general revocation provision permits revocation by the broadest range of means. In addition to the methods typically enumerated, a physical sign communicating an intent to revoke would be sufficient to effect a revocation.[96]

A sample declaration is included in the Uniform Act.[97] The form is not mandatory, as some statutes require,[98] nor is it necessary that a declaration be "substantially" similar to the sample, as required by Indiana.[99] In keeping with the Uniform Act's general philosophy, the example provided is uncomplicated, demonstrating that such declarations are legally sufficient.[100] More elaborate statements are, of course, also permitted.

Elimination of complex witness procedures and of the requirement that a declaration be in a particular form relieves physicians of much of the burden of determining the validity of a living will. The Uniform Act goes one step further, however, and explicitly states that "[i]n the

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[90]UNIFORM ACT § 2 comment, 9A U.L.A. 455, 458-59 (1985).

[91]*Id.* The comment notes that the absence of witness qualifications relieves physicians of the inappropriate burden of determining whether a declaration has been properly witnessed. Since many physicians would be hesitant to make such legal decisions, elaborate witness requirements jeopardize the effectiveness of living wills. *See supra* notes 69-73 and accompanying text.

[92]UNIFORM ACT § 4, 9A U.L.A. 455, 459 (1985).

[93]*Id.* It may be communicated either by the declarant or by anyone who witnessed the revocation.

[94]IND. CODE ANN. § 16-8-11-13 (West Supp. 1986).

[95]*See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3203 (1986); DEL. CODE ANN. tit. 16, § 2504 (1983); FLA. STAT. ANN. § 765.06 (West 1986); IDAHO CODE § 39-4505 (1985); LA. REV. STAT. ANN. § 40:1299.58.4 (West Supp. 1987); N.H. REV. STAT. ANN. § 137-H:7 (Supp. 1986).

[96]UNIFORM ACT § 4 comment, 9A U.L.A. 455, 459-60 (1985).

[97]*Id.* § 2(b), 9A U.L.A. at 458.

[98]*See* CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1987); IDAHO CODE § 39-4504 (1985 & Supp. 1986); OR. REV. STAT. § 97.055 (1984); WIS. STAT. ANN. § 154.03 (West Supp. 1986).

[99]IND. CODE ANN. § 16-8-11-12 (West Supp. 1986).

[100]UNIFORM ACT § 2 comment, 9A U.L.A. 455, 458-59 (1985).

absence of knowledge to the contrary, a physician or other health-care provider may presume that a declaration complies with this [Act] and is valid."[101]

While in some respects the coverage of the Uniform Act is not as broad as that of some statutes,[102] in other ways it is broader. As previously noted, most living wills are operative only when the declarant is in a terminal condition.[103] Some statutes define terminal condition as one in which death is imminent, "whether or not" or "regardless" of whether life-sustaining treatment is used.[104] If death is imminent even with aggressive treatment, a living will offers little relief. The Uniform Act avoids this pitfall by defining terminal condition as "an incurable or irreversible condition that, *without* the administration of life-sustaining procedures will, in the opinion of the attending physician, result in death within a relatively short time."[105] While this definition is similar to that in the Indiana statute,[106] the Uniform Act defines a "qualified" patient, one from whom a physician may withhold treatment with immunity, as a patient in a terminal condition who has executed a declaration.[107] To be a "qualified patient" under the Indiana statute, however, there also must be a determination that the patient will die from the terminal condition whether or not life-prolonging procedures are used.[108] The Indiana definition of a qualified patient substantially undercuts the breadth of its definition of a terminal condition.[109]

The Uniform Act's definition of "life-sustaining" procedures also expands the scope of the Act. Life-sustaining procedures are defined as "any medical procedures or intervention that, when administered to a qualified patient, will serve only to prolong the dying process."[110] Unlike the Indiana statute, which specifically excludes nutrition, hydration, and medication,[111] the Uniform Act's broad definition affords a declarant greater autonomy. Because there is no prescribed form to follow, de-

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[101] *Id.* § 11, 9A U.L.A. at 463.

[102] *See supra* note 85 and accompanying text.

[103] *See supra* note 34 and text accompanying note 7.

[104] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7187 (West Supp. 1987); GA. CODE ANN. § 88-4102(10) (Harrison 1986); MD. HEALTH-GEN. CODE ANN. §§ 5-601, -602(c) (Supp. 1986); *cf.* MO. ANN. STAT. § 459.010 (Vernon Supp. 1987) (terminal condition is such that "death will occur within a short time regardless of the application of medical procedures"); TENN. CODE ANN. § 32-11-103(9) (Supp. 1985) (terminal condition defined as one which is expected to cause death "within a short period of time regardless of the use or discontinuance of medical treatment"); WIS. STAT. ANN. § 154.01(8) (West Supp. 1986) (terminal condition is one which is expected to cause death "within 30 days, regardless of the application of life-sustaining procedures").

[105] UNIFORM ACT § 1(9), 9A U.L.A. 455, 456 (1985) (emphasis added).

[106] *See* IND. CODE ANN. § 16-8-11-9 (West Supp. 1986); *see also supra* note 81 and accompanying text.

[107] UNIFORM ACT § 1(7), 9A U.L.A. 455, 456 (1985).

[108] IND. CODE ANN. § 16-8-11-8 (West Supp. 1986); *see also supra* note 83.

[109] *See supra* notes 79-83 and accompanying text.

[110] UNIFORM ACT § 1(4), 9A U.L.A. 455, 456 (1985).

[111] IND. CODE ANN. § 16-8-11-4 (West Supp. 1986).

clarants may direct that no life-sustaining procedures be used or they may, if they choose, narrow the kind of treatment to be withheld.

Unfortunately, the definitions in the Uniform Act of both "terminal condition" and "life-sustaining procedure" are imprecise. A terminal condition is one expected to cause death within a "relatively short time"[112] and a life-sustaining procedure is treatment which serves "only to prolong the dying process."[113] Neither of these phrases is devoid of ambiguity; yet, the Indiana Act also uses both definitions.[114] The use of the short period of time language avoids the problems caused by using the term "imminent" and provides greater flexibility than setting a fixed time period such as six months or a year.[115] Although the comments to the Uniform Act reflect a bias against the use of a fixed time period,[116] the ability of declarants under the Act to tailor their instructions allows those who wish to restrict their physicians' discretion to do so, an ability not clearly countenanced by the Indiana Act.[117]

Defining life-sustaining procedures as those that "only prolong the dying process"[118] of a qualified patient is equally imprecise. Because a qualified patient must suffer from a terminal condition,[119] and a terminal condition is one that is incurable or irreversible,[120] the phrase "only prolongs the dying process" cannot mean simply that the life-sustaining procedures will not cure the condition. Such a reading would make the phrase superfluous. At a minimum, the language must mean that death is not merely postponed if a procedure counteracts a disease which

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[112]UNIFORM ACT § 1(9), 9A U.L.A. 455, 456 (1985).

[113]*Id.* § 1(4), 9A U.L.A. at 456.

[114]IND. CODE ANN. §§ 16-8-11-4, -9 (West Supp. 1986).

[115]UNIFORM ACT § 1 comment, 9A U.L.A. 455, 456-58 (1985). The phrase "relatively short time" was suggested by medical experts. *Id.* at 457.

[116]The comment to section 1 one states:

> The "relatively short time" formulation is employed to avoid both the unduly constricting meaning of "imminent" and the artificiality of another alternative—fixed time periods, such as 6 months, 1 year, or the like. The circumstances and inevitable variations in disorder and diagnosis make unrealistic a fixed time period. Physicians may be hesitant to make predictions under a fixed time period standard unless the standard of physician judgment is so loose as to be unenforceable . . . .

UNIFORM ACT § 1 comment, 9A U.L.A. 455, 457 (1985).

[117]The Indiana Act requires a declaration to "be substantially in the form set forth [in § 12], but the declaration may include additional specific directions. The invalidity of any additional specific directions does not affect the validity of the declaration." IND. CODE ANN. § 16-8-11-12 (West Supp. 1986). The apparent intent of that language is to permit declarants to replace the general language in the statute with specific directions. The problem is that physicians are left with the burden of determining first whether the altered declaration is substantially like the sample, and second whether the additional directions should be honored. To avoid the expense and delay of a court hearing to determine the validity of a declaration, declarants would be well advised simply to follow the statutory sample.

[118]*See supra* note 113.

[119]*See supra* note 107.

[120]*See supra* note 105.

cannot be cured. For example, although diabetes and certain kidney disorders are incurable, insulin and dialysis do more than simply postpone death. It is unclear, however, whether procedures that only afford the patient some opportunity for continued personal interaction are considered to do more than merely prolong the dying process. Unfortunately, it is unlikely that greater precision in defining life-sustaining procedures can be obtained without unduly restrictive language. However, under the Uniform Act,[121] but not the Indiana Act,[122] declarants are free to be as specific in their directions as they please.

The Uniform Act and Indiana Act differ with regard to a physician's liability for failure either to comply with a living will or to transfer the patient to another physician willing to carry out the declarant's wishes. The Indiana Act states that a living will does not obligate a physician to withhold or withdraw life-prolonging procedures,[123] although an unwilling physician should ordinarily transfer the patient to another physician.[124] A physician who knowingly fails to do either does not face criminal liability but is subject only to disciplinary sanctions, as if the physician had violated a rule promulgated by the medical licensing board.[125] On the other hand, the Uniform Act suggests that willful failure to comply with the Act should be punishable as a misdemeanor.[126] However, all of the specific medical judgments called for throughout the Uniform Act are expressly subject to "reasonable medical standards."[127] Whatever incentive there is to act precipitously to avoid criminal liability for failure to comply with a declaration is tempered by the fact that immunity from liability for withdrawing treatment is available only if the physician's decisions are in accord with reasonable medical standards.[128]

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[121]*See supra* notes 97-112 and accompanying text.

[122]*See supra* notes 99, 117 and accompanying text.

[123]IND. CODE ANN. § 16-8-11-11(f) (West Supp. 1986); *see also supra* note 57 and accompanying text.

[124]IND. CODE ANN. § 16-8-11-14 (West Supp. 1986). A physician who refuses to withhold or withdraw life-prolonging procedures from a qualified patient is directed to transfer the patient to a physician who will honor the living will declaration unless the "attending physician, after reasonable investigation, finds no other physician willing to honor the patient's declaration," *id.* § 16-8-11-14(f), or "the physician has reason to believe the declaration was not validly executed or there is evidence that the patient no longer intends the declaration to be enforced," *id.* § 16-8-11-14(e)(1)-(2). If the physician refuses to transfer a patient for the latter reasons, the statute imposes upon the physician an obligation to attempt to ascertain the validity of the declaration and the patient's intention by consulting with certain individuals, such as the patient's legal guardian, health care agent, enumerated family members or the patient's clergy. *Id.*

[125]*Id.* § 16-8-11-22.

[126]UNIFORM ACT § 9, 9A U.L.A. 455, 461 (1985).

[127]*Id.* § 8(b), 9A U.L.A. at 461.

[128]Under the Uniform Act, reasonable medical standards apply to all medical decisions, i.e., diagnosing the patient as "terminal" and characterizing a procedure as one which only prolongs the dying process. A physician who negligently diagnoses a patient as terminal and withdraws treatment can be liable for his actions. *Id.* § 8 comment, 9A

The Uniform Act, like most others, contains a number of miscellaneous statements that clarify the operation and intent of the statute. Like the Indiana statute,[129] it provides:

> 1. The act does not condone, authorize or approve of euthanasia.[130]
> 2. The act creates no presumption concerning the intention of a person who has not executed a living will.[131]
> 3. Death resulting from withholding or withdrawing life-sustaining procedures pursuant to a declaration does not constitute suicide.[132]
> 4. The act does not impair or supersede any right or responsibility any person has to withhold or withdraw medical care.[133]
> 5. Unless the declaration otherwise provides, the declaration of a pregnant patient has no force or effect, if it is probable that the fetus could develop to the point of live birth with continued use of life-sustaining procedures.[134]

Unlike the Indiana Act, the Uniform Act also contains a section recognizing the validity of living wills executed in another state in com-

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U.L.A. at 462.

The Indiana Act does not state that the attending physician's decisions are subject to reasonable medical standards. *See* IND. CODE ANN. § 16-8-11-14(c) (West Supp. 1986). Curiously, however, a health care provider or an employee is accorded immunity for participation in withholding or withdrawing life-prolonging procedures only if he acts "in good faith; and . . . [i]n accordance with reasonable medical standards." *Id.* § 16-8-11-14(d). It is doubtful that the Indiana legislature intended to hold attending physicians only to a good faith standard and not to reasonable medical standards. In fact, since it is lawful under the Indiana Act for an attending physician to withhold or withdraw treatment only from a "qualified" patient, a negligent diagnosis of a "terminal condition" would probably expose a physician to liability for withholding or withdrawing treatment. If the patient's condition is not terminal, the patient is not properly characterized as "qualified" and the immunity provided by the statute would not be available. It is unfortunate, however, that such a crucial matter is not made clear on the face of the statute.

[129]*See supra* notes 64-68 and accompanying text.

[130]UNIFORM ACT § 10(g), 9A U.L.A. 455, 463 (1985).

[131]*Id.* § 10(d), 9A U.L.A. at 463. The Uniform Act is broader than the Indiana Act. The Indiana Act simply states that it creates no presumption concerning the intention of a person who has not executed a living will. IND. CODE ANN. § 16-8-11-19 (West Supp. 1986). The Uniform Act says that it creates no presumption concerning the intention of an individual who has revoked or has not executed a living will. UNIFORM ACT § 10(d), 9A U.L.A. 455, 463 (1985).

[132]UNIFORM ACT § 10(a), 9A U.L.A. 455, 462 (1985).

[133]*Id.* § 10(e), 9A U.L.A. at 463.

[134]*Id.* § 6(c), 9A U.L.A. at 460. Unlike the Indiana Act, this provision of the Uniform Act permits a woman specifically to decline treatment even though she may be pregnant and it is probable that the fetus could develop to a point of viability outside the womb. The United States Catholic Bishops' Committee for Pro-Life Activities has criticized this provision as well as the ambiguity of certain definitions and the failure of the Uniform Act to recognize adequately the benefit of nutrition and hydration in sustaining life. *See* Committee for Pro-Life Activities, *The Rights of the Terminally Ill*, 16 ORIGINS 222 (1986).

pliance with the law of that state or in compliance with the Uniform Act.[135]

The greatest difference between the Indiana Act and the Uniform Act is that the Uniform Act does not authorize a declaration requesting the use of life-prolonging procedures.[136] If protection of autonomy is a primary goal of the legislation, such declarations should be authorized as long as they obligate physicians to continue only those life-sustaining procedures that reasonable medical judgment indicates are appropriate.[137] The problem with the Indiana provision is that it obligates physicians to use any medical procedure that would serve to prolong life,[138] apparently even procedures that might not be medically appropriate. For example, for many ninety-year-old patients, heart by-pass surgery offers insufficient benefits in comparison to its burdens to justify the surgery. A life-prolonging procedures declaration under the Indiana Act arguably compels physicians to perform such surgery as long as any expectation exists that the surgery could extend the patient's life for even a brief period of time. While protecting patient autonomy may be laudable, the appropriateness of permitting patients to demand treatment that is not medically indicated is doubtful.

V. Conclusion

The Uniform Act is superior to the existing Indiana Act in several ways. First, the breadth of its definitions of "terminal condition," "life-sustaining procedures" and "qualified patient" grants the individual greater freedom to decide the course of his medical treatment without abandoning the normative constraint of making living wills operative only if the patient is in a terminal condition. At the same time, the Uniform Act permits one who wishes to narrow the situation in which the declaration is to operate or the kinds of treatment to be withheld to do so. Second, physicians are freed of the burden of determining the legal validity of the instrument and thus are likely to be less hesitant to effectuate it. Yet, in all instances physicians are protected only if their actions are in accord with reasonable medical standards. For these reasons, the Indiana legislature should consider replacing its Living Wills

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[135]*Id.* § 12, 9A U.L.A. at 463. The Indiana Act is silent not only as to the validity of declarations executed in other states, but also as to the validity of declarations executed in Indiana prior to September 1, 1985, the effective date of the Indiana Act.

[136]The Uniform Act does not prohibit such declarations. It provides only a non-exclusive way by which a terminally ill patient's desires can be legally implemented. *See* Uniform Act Prefatory Note, 9A U.L.A. 455, 455 (1985). For discussion of the Indiana provision, see *supra* notes 56, 75-77 and accompanying text.

[137]If the Indiana legislature adopts the Uniform Act, the Act could be amended to include a provision explicitly authorizing such a life-prolonging procedures declaration. Of course, such an amendment at least partially defeats the attempt at uniformity among the states.

[138]Ind. Code Ann. § 16-8-11-11(g) (West Supp. 1986).

and Life-Prolonging Procedures Act with the Uniform Rights of the Terminally Ill Act.

CASENOTES

Morgan Drive Away, Inc. v. Brant: Indiana Topples a Milestone in the Law of Retaliatory Discharge

I. Introduction

Omission of a specific period of hire from an employment contract still provides a simple, effective means of dismissing unacceptable employees.[1] Blind application of this employment at will rule, however, permits wrongful termination of many acceptable employees as well.[2] Thus, a majority of courts have carved various exceptions from the rule and in certain situations have allowed former employees to maintain actions against former employers for retaliatory or wrongful discharge.[3]

Indiana courts have recognized a limited public policy exception to the employment at will rule since 1973, when the Indiana Supreme Court handed down its landmark decision in *Frampton v. Central Indiana Gas Co.*[4] In *Frampton*, the supreme court apparently established a cause of action for retaliatory discharge based upon an employee's exercise of a statutorily conferred right, such as a claim for workmen's compensation.[5]

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[1]American courts agree that generally an employment contract containing no specific termination date is terminable by either the employer or the employee at any time for any or no reason. *See, e.g.*, Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814 (Ala. 1984); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 478 N.E.2d 1354 (1985); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Clifford v. Cactus Drilling Corp., 419 Mich. 356, 353 N.W.2d 469 (1984); Mueller v. Union Pac. R.R., 220 Neb. 742, 371 N.W.2d 732 (1985); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985). Indiana courts have long adhered to the employment at will rule. *See, e.g.*, Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 48 N.E. 595 (1897).

[2]*See generally* Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law 1 (1984); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv. L. Rev. 1931 (1983).

[3]*See generally* Lopatka, *supra* note 2; Note, *supra* note 2. These observers have noted that at least three-fifths of the states have recognized some type of exception to the employment at will rule. Actions for retaliatory discharge fall into three general categories: (1) breach of implied contractual terms, (2) breach of an implied duty of good faith and fair dealing, and (3) violation of public policy. The latter category has three sub-categories: (a) wrongful dismissal for refusal to commit an unlawful act, (b) wrongful dismissal for performance of an important public obligation, and (c) wrongful dismissal for the exercise of a statutory right or privilege.

[4]260 Ind. 249, 297 N.E.2d 425 (1973).

[5]*Id.* at 253, 297 N.E.2d at 428.

Subsequently, many courts throughout the nation turned to the *Frampton* decision for guidance in evaluating the continued propriety of the employment at will doctrine in their jurisdictions.[6]

In *Morgan Drive Away, Inc. v. Brant*,[7] a 1986 decision, the Indiana Supreme Court had the opportunity to build upon its earlier precedent in this developing area of labor law[8] by expanding upon the *Frampton* decision. Instead, the supreme court may have toppled the *Frampton* milestone.[9] In so doing, the *Morgan* court disregarded the national movement to limit the employment at will rule.[10] Moreover, the supreme court provided little justification for its decision and, in fact, acted inconsistently with the reasoning in *Frampton* and its progeny.[11] Consequently, confusion and dissent have overshadowed the well-reasoned body of Indiana law regarding retaliatory discharge.[12] This Casenote will examine the deficiencies and effects of the supreme court's decision in *Morgan*.[13]

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[6]*See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (dismissal for refusal to violate indecent exposure statute may provide basis for retaliatory discharge action); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (dismissal for refusal to participate in illegal price fixing scheme provides basis for retaliatory discharge action); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982) (dismissal to induce employee to leave the state and not testify in grand jury proceeding would present grounds for retaliatory discharge action); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (dismissal for filing workmen's compensation claim provides basis for retaliatory discharge action); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (dismissal for reporting sexual harassment presents basis for retaliatory discharge action); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984) (dismissal for filing workmen's compensation claim presents grounds for retaliatory discharge action). *But cf.* Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814 (Ala. 1984) (refusal to allow exception to employment at will rule for filing workmen's compensation claim). *See also* Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985) (although there was no citation to *Frampton*, the court allowed an action for retaliatory discharge where an employee exercised a statutory right to vote stock rights). *But cf.* Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (employment at will rule applied despite employee's bringing of private lawsuit against employer); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976) (statute allowing stockholders to inspect corporate records could not circumvent employment at will rule).

[7]489 N.E.2d 933 (Ind. 1986).

[8]Labor law scholars have characterized the status of the employment at will rule as "the labor law issue of the 80s." *See* Lopatka, *supra* note 2, at 1; *see also* Address by Edward J. Murphy, John N. Matthews Professor of Law, University of Notre Dame, in Indianapolis, Ind. (January 12, 1987); Address by Thomas Scharnhart, Professor of Law, Indiana University - Bloomington, in Indianapolis, Ind. (January 27, 1987).

[9]The *Morgan* court recognized *Frampton* as "a milestone in the march of Indiana common law." 489 N.E.2d at 934.

[10]*See infra* notes 21-35 and accompanying text.

[11]*See infra* notes 36-63 and accompanying text.

[12]*See infra* notes 64-69 and accompanying text.

[13]It should be noted that besides vindication or retribution, the potential award of punitive damages is a most appealing feature of retaliatory discharge actions for plaintiffs. Punitive damages are possible because the employer's action in firing an employee is intentional. *See Frampton*, 260 Ind. at 253, 297 N.E.2d at 428.

Another consideration is that the employee might prefer to continue working under a strained relationship with the employer rather than face the uncertainty of today's constricted job market. *See, e.g.*, Lopatka, *supra* note 2, at 2-3.

II. A Lawsuit for Wages Due Leads to Discharge

In *Morgan*, Marion Brant, an apparent at-will employee,[14] claimed that his employer wrongfully discharged him for seeking back pay in a small claims action pursuant to an Indiana wage statute.[15] Over the objection of defendant Morgan Drive Away, Inc., the trial court instructed the jury that Indiana law prohibits the discharge of an employee "in retaliation for the filing of a lawsuit . . . over a wage or payment dispute."[16] The jury found in Brant's favor and awarded compensatory and punitive damages.[17]

On appeal, the Third District panel agreed with the trial court's interpretation of Indiana law regarding retaliatory discharge.[18] Assuming Brant was an employee, the court said, "Brant would have had a statutory right to sue Morgan for payment of his wages . . . . Consequently, termination of Brant solely for filing the small claims action would violate the *Frampton* rule."[19] In a terse 4-1 decision, however, the Indiana Supreme Court disagreed.[20]

III. Disregarding the Status of the Employment at Will Rule: Termination for Any Reason or No Reason—Sometimes

In declining to extend the *Frampton* rule, the *Morgan* court made no mention of the growing national disfavor of the employment at will rule.[21] Judges and other legal scholars have traced the beginnings of the employment at will rule to a nineteenth century treatise on master-servant law.[22] Apparently, the employment at will rule was premised upon theories

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[14]In *Morgan*, there was an issue of whether the plaintiff was an employee or an independent contractor. In the latter case, a retaliatory discharge theory would not fly because there would have been no contract in effect, and thus no discharge. The court remanded the case for a determination of Brant's status and whether he might be entitled to other contract damages. 489 N.E.2d at 934.

[15]*Id.* at 933. Ind. Code § 22-2-4-4(4) (Supp. 1986) provides:

> Every corporation, company, association, firm, or person who shall fail for ten (10) days after demand of payment has been made to pay employees for their labor, in conformity with the provisions of this chapter, shall be liable to such employee for the full value of his labor, to which shall be added a penalty of one dollar ($1) for each succeeding day, not exceeding double the amount of wages due, and a reasonable attorney's fee, to be recovered in a civil action and collectable without relief.

[16]*See Morgan*, 479 N.E.2d 1336, 1337 (Ind. Ct. App. 1985), *vacated*, 489 N.E.2d 933 (Ind. 1986).

[17]*Id.*

[18]*Id.* at 1338.

[19]*Id.*

[20]*Morgan*, 489 N.E.2d at 934. In all, the majority opinion by Justice Dickson and lone dissent by Justice DeBruler in *Morgan* occupied two pages in the reporter. Of the five justices on the court, only Chief Justice Givan and Justice DeBruler were on the court when it decided *Frampton*, and both sided with the majority in that case.

[21]*See* Lopatka, *supra* note 2; Note, *supra* note 2.

[22]H. Wood, A Treatise on the Law of Master and Servant (1877).

of free enterprise and contract, as well as a societal need for industrial expansion.[23] The rule may have served society well during the Industrial Revolution, but conditions and attitudes have since changed.[24] The primary criticism today is the unnecessary hardship created by the employment at will rule.[25]

Although modern society shields many employees from wrongful discharge via collective bargaining agreements or civil service statutes, as many as seventy million employees are not afforded such protection.[26] Legal scholars have estimated that approximately 200,000 at-will employees wrongfully lose their jobs each year as employers retaliate for employee conduct of which they disapprove.[27] Faced with cases where employers had fired at-will employees for refusing to testify falsely on behalf of employers,[28] for pointing out employers' violations of public health codes,[29] for resisting the sexual advances of superiors,[30] for voting shares of stock independently of the wishes of employers,[31] for refusing to cooperate in illegal schemes,[32] and for filing workmen's compensation claims,[33] courts began to limit the broad reach of the employment at will rule in favor of public policy considerations raised by these situations. As one state supreme court reasoned, "It is difficult to justify this court's further adherence to a rule which permits an employer to fire someone for 'cause morally wrong.' "[34] By disregarding the national

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[23]*See generally* Note, *supra* note 2, at 1933. The modern employment at will rule deviates from its predecessor under the English common law, which presumed employment to last for at least one year unless the contract provided differently, thus providing some relief from sudden dismissal. *Id.*

[24]*See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981) ("With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.").

[25]*See supra* note 2.

[26]*See* Note, *supra* note 2, at 1934.

[27]*See* Lopatka, *supra* note 2, at 2.

[28]*See, e.g.*, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *cf.* Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982) (Parnar was fired to induce her to leave the jurisdiction and not testify before the grand jury).

[29]*See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).

[30]*See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); *see also* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (where employee refused to participate in indecent exposure, heavy drinking, and "grouping up," discharged employee stated cause of action for retaliatory discharge).

[31]*See* Bowman v. State Bank of Keysville, 331 S.E.2d 797 (Va. 1985).

[32]*See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

[33]*See, e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas. Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

[34]*Wagenseller*, 147 Ariz. at 378, 710 P.2d at 1033.

movement to limit the reach of the employment at will rule, the Indiana Supreme Court has abdicated its leading role in the area.[35]

IV. Replacing Law with Inconsistency and Confusion

A. Toppling the Frampton *Milestone*

The *Morgan* court recognized *Frampton* as "a milestone in the march of Indiana common law."[36] In *Frampton*, an employee claimed that she was fired in retaliation for her filing a workmen's compensation claim.[37] Relying upon the employment at will rule, the trial court dismissed the case and the court of appeals affirmed.[38] Although it agreed with the lower courts' interpretation of the role of the employment at will rule in Indiana law, the supreme court reversed in a 4-1 decision.[39]

The *Frampton* court based its decision on a finding that workmen's compensation legislation provides rights designed to protect employees and that retaliatory discharge would substantially chill the exercise of those rights.[40] The supreme court also said that permitting retaliatory discharge for exercising statutory rights would promote coercive, duress-provoking acts by employers in contravention of public policy.[41] Consequently, the court concluded that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general [employment at will] rule must be recognized."[42]

One flaw in *Frampton* is that it lends itself to two readings because of an unfortunate choice of words by the court.[43] Read most broadly, *Frampton* stands for the proposition that employers may not fire at-will employees "solely for exercising a statutorily conferred right."[44] Read most narrowly, the landmark case says only that "an employee who alleges he or she was retaliatorily discharged for filing a claim pursuant to the Indiana Workmen's Compensation Act or the Indiana

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[35]*See supra* note 6.

[36]*Morgan*, 489 N.E.2d at 934.

[37]260 Ind. 249, 250, 297 N.E.2d 425, 426 (1973).

[38]*Id.* at 249-50, 297 N.E.2d at 426.

[39]*Id.* at 253, 297 N.E.2d at 428. Justice Hunter wrote the opinion for the court, with which Chief Justice Arterburn and Justices DeBruler and Givan concurred. Justice Prentice dissented without opinion.

[40]*Id.* at 251-52, 297 N.E.2d at 427.

[41]*Id.* at 252, 297 N.E.2d at 428.

[42]*Id.* at 253, 297 N.E.2d at 428.

[43]The difficulty manifests itself in current cases. *See, e.g.*, McClanahan v. Remington Freight Lines, Inc., 498 N.E.2d 1336, 1340 (Ind. Ct. App. 1986) ("We are necessarily troubled by an arguable implication in *Morgan Drive Away* that the *Frampton* exception may be available only in cases involving workmen's compensation claims. . . . [W]e can only conclude that the possible implication is not . . . controlling.").

[44]*Frampton*, 260 Ind. at 253, 297 N.E.2d at 428.

Workmen's Occupational Diseases Act has stated a claim upon which relief can be granted."[45]

The *Morgan* court pointed out this discrepancy but opted for the narrow reading rather than what it termed the embellishment of the broader language.[46] The *Morgan* court attributed the *Frampton* court's holding to the purpose and particular language of the workmen's compensation statute.[47] The *Frampton* court did base its decision in part on the fact that the General Assembly specifically prohibited the use of any "device" that might thwart the statute's application and that threats of discharge amount to a "device."[48] But, the General Assembly's specific prohibitions are little more than an embellishment of the overall statutory scheme of workmen's compensation because certainly all laws are drafted with the intent that they not be thwarted by devices or by any other means.[49] At the heart of *Frampton* was the theory that employers should not be able to inhibit through coercion the exercise of statutory rights, a likely result absent an employee cause of action for retaliatory discharge.[50] Although *Morgan* adheres to the strict holding of *Frampton* under the latter's facts, the *Morgan* decision fails to embody the spirit of *Frampton* inherent in the broader reading.

Limiting the statutory rights that an employee may exercise without fear of discharge to those found in workmen's compensation legislation makes no sense.[51] The *Frampton* court's comments regarding the legislative intent behind the workmen's compensation statute apply equally well to the underlying wage statute in *Morgan*.[52] Just as in *Frampton*, the employee in *Morgan* asserted a statutory right—a right particularly designed to protect employees.[53] Just as in *Frampton*, the employer in *Morgan* could easily thwart the remedial goal of the statute through coercion and threats of discharge.[54] As the *Frampton* court suggested, "If employers are permitted to penalize employees for filing workmen's compensation claims . . . employees will not file claims for justly deserved

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[45]*Id.*

[46]489 N.E.2d at 934.

[47]*Id.* at 933-34. The statute involved in *Frampton* provided in pertinent part: "No contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by chapters 2 through 6 of this article [involving the providing of compensation to injured workers]." IND. CODE § 22-3-2-15 (1981).

[48]260 Ind. at 252, 297 N.E.2d at 427-28.

[49]"[W]here laws end, tyranny begins." William Pitt, Earl of Chatham, Speech in the House of Lords in defense of John Wilkes, January 9, 1770, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 426 (14th ed. 1968).

[50]*See supra* notes 40-42 and accompanying test.

[51]As noted in McClanahan v. Remington Freight Lines, Inc., 498 N.E.2d 1336, 1341 n.3 (Ind. Ct. App. 1986), there is no "logical reason for granting the right to workmen's compensation benefits" the "exalted status" of being the only statutory right actionable under a retaliatory discharge theory.

[52]*See supra* note 15.

[53]*Id.*

[54]*See Frampton*, 260 Ind. at 252, 297 N.E.2d at 428.

compensation—opting, instead, to continue their employment without incident."[55] The same reasoning is true with regard to the wage statute relied upon in *Morgan*.[56] As Justice DeBruler explained in his lone dissent in *Morgan*, "The right of workers to access to courts to recover wages due from employers for work done is . . . every bit the equivalent of the right of injured workers to access to the workmen's compensation board . . . ."[57] By reading the *Frampton* decision too narrowly, the *Morgan* court abandoned the logic of that "milestone" case.

B. Misapplying Decisions by Indiana Appellate Courts

In an effort to justify its decision, the *Morgan* court cited several cases for the proposition that Indiana appellate courts have refused to recognize retaliatory discharge actions in cases not involving workmen's compensation claims.[58] The problem with this approach is that in no other Indiana case involving retaliatory discharge has an employee claimed wrongful termination for asserting a valid statutory right.[59] In each of the cases cited by the *Morgan* court, the employee-plaintiff claimed that his or her discharge violated some broad notion of public policy, such as reporting illegal activities by a superior[60] or exercising freedom of association by marrying a person of her choice.[61] Even Indiana cases not cited by the *Morgan* court do not include facts where an employee-plaintiff has asserted a statutorily conferred right,[62] as in *Frampton*. In fact, the cases suggest that Indiana appellate courts would rule favorably for a plaintiff who brought his or her claim pursuant to a valid statutory right.[63] Thus, the *Morgan* court misapplied and acted inconsistently with the developing Indiana case law of retaliatory discharge.

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[55]*Id.* at 252, 297 N.E.2d at 427.

[56]*See supra* note 15.

[57]489 N.E.2d at 934 (DeBruler, J., dissenting).

[58]*Id.*

[59]*See* McClanahan v. Remington Freight Lines, Inc., 498 N.E.2d 1336, 1340 (Ind. Ct. App. 1986).

[60]Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979).

[61]McQueeney v. Glenn, 400 N.E.2d 806 (Ind. Ct. App. 1980).

[62]*See, e.g.*, Romack v. Public Serv. Co., 499 N.E.2d 768 (Ind. Ct. App. 1986) (plaintiff's reliance upon federal safety guidelines failed to sustain action for retaliatory discharge because guidelines did not confer personal right upon plaintiff); Rice v. Grant County Bd. of Comm'rs, 472 N.E.2d 213 (Ind. Ct. App. 1984) (where employee drove truck outside county limits and it became stuck, forcing a tow back to the department, alleged reasonableness of employee's action provided no basis for claim of retaliatory discharge).

[63]Certainly the Third District Court of Appeals was receptive to the theory of retaliatory discharge because it ruled in Morgan's favor on appeal. And in the recent case of Tri-City Comprehensive Community Mental Health Center, Inc. v. Franklin, 498 N.E.2d 1303, 1306 (Ind. Ct. App. 1986), the Third District continued to use the broad language from *Frampton* and cited *Morgan* only for the proposition that the General Assembly, rather than the courts, must revise the rule. *Tri-City* involved a flawed public policy argument founded upon the due process clause of the United States Constitution.

In Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980), *aff'd*, 421

Consequently, confusion reigns in Indiana as to how to interpret the law of retaliatory discharge. In *Reeder-Baker v. Lincoln National Corp.*,[64] the United States District Court for the Northern District of Indiana recently interpreted *Morgan* for the narrow proposition that retaliatory discharge actions lie only when an employer fires an employee for filing a workmen's compensation claim.[65] In so holding, the *Reeder-Baker* court overturned a line of cases that recognized an action for retaliatory discharge when an employer had fired an employee for filing a Title VII discrimination claim.[66] But recently in *McClanahan v. Remington Freight Lines, Inc.*,[67] the Indiana Court of Appeals for the Second District questioned whether the supreme court meant what it said in *Morgan*:

> The language in *Frampton* indicates that the court did not intend its holding to be limited to cases involving workmen's compensation claims. . . . We cannot believe that the Supreme Court intended for *Morgan Drive Away* to have such effect, especially in light of the court's reference in *Morgan Drive Away* to *Frampton* as "a milestone in the march of Indiana Common law." Surely the court did not intend for the march to halt and become a full-fledged retreat.[68]

Thus, the *McClanahan* court held that a truck driver did have an action for retaliatory discharge when he was fired for refusing to drive a truck in violation of road weight limits.[69]

V. Conclusion

The employment at will rule has long influenced labor law.[70] But societal conditions no longer justify blanket application of the rule.[71] Thus, various exceptions are leading to the abandonment of the rule in certain situations.[72] One of those situations is where an employer uses

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N.E.2d 1099 (Ind. 1981), the First District Court of Appeals pointed out that the fatal error in the plaintiff's case was a failure to demonstrate a personal right conferred by statute; thus, the court focused upon the broader language of *Frampton*. In Rice v. Grant County Bd. of Comm'rs, 472 N.E.2d 213 (Ind. Ct. App. 1984), the Second District Court of Appeals, in discussing *Frampton*, also focused upon the broad language regarding the exercise of a statutory right rather than the narrow holding of *Frampton*. *See also* Buethe v. Britt Airlines, 787 F.2d 1194 (7th Cir. 1986), where the court noted the supreme court's decision in *Morgan*, but still focused on the broad language of exercising a statutory right.

[64]644 F. Supp. 983 (N.D. Ind. 1986).

[65]*Id.* at 985.

[66]*Id.* at 986.

[67]498 N.E.2d 1336 (Ind. Ct. App. 1986).

[68]*Id.* at 1341.

[69]*Id.* at 1343.

[70]*See supra* note 22.

[71]*See supra* notes 24-34.

[72]*See supra* note 3.

the rule to retaliate for an employee's exercise of a statutorily conferred right.[73]

The Indiana Supreme Court developed this particular exception and had the opportunity to expand upon it in *Morgan Drive Away, Inc. v. Brant*.[74] But in an opinion marred by insufficient analysis, the court declined to do so.[75] The *Morgan* court adhered to a narrow reading of *Frampton v. Central Indiana Gas Co.*[76] and ignored the sound policy reasons and logic underlying that landmark case.[77] Moreover, the *Morgan* court disregarded the emerging national disfavor for the employment at will rule[78] and misread the attitude toward that rule in Indiana.[79] Thus, the Indiana Supreme Court certainly tipped, if not toppled, a milestone case in the law of retaliatory discharge.

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[73]*See supra* note 5.
[74]489 N.E.2d 933 (Ind. 1986).
[75]*Id.* at 934.
[76]*See supra* notes 40-50.
[77]*See supra* notes 51-57.
[78]*See supra* notes 21-35.
[79]*See supra* notes 58-69.

Exchange of Confidential Communications Between Sister Corporations: An Exception to Waiver of Privilege Under *Roberts v. Carrier Corp.*

I. Introduction

This Casenote will examine a recent federal case construing Indiana law on attorney-client and work product privileges, *Roberts v. Carrier Corp.*[1] The tests set forth in *Roberts* for determining when there may be disclosure of confidential information to a third party without thereby subjecting the information to the discovery process will be compared and contrasted with functionally similar tests set forth in other federal and Indiana cases. The *Roberts* exception goes beyond the exception established in *Duplan v. Deering Milliken, Inc.*,[2] for exchange of communications between parent and subsidiary corporations because the *Roberts* court extended the exception to sister corporations that are not formally related to one another. The *Roberts* exception applies not only to the work product privilege, as was the case in *United States v. AT&T*,[3] but to attorney-client privilege as well. Procedural and practical implications for the attorney-client relationship resulting from these exceptions to waiver of privilege will be examined. Various advantages and difficulties which may be encountered in applying the *Roberts* exception in the modern corporate context will be considered.

II. The Nature of Discovery and Privileges in Indiana

In 1970, the Indiana Supreme Court adopted the Indiana discovery rules.[4] The source of those rules was the November 1967 Proposed Amendments to the Federal Rules of Civil Procedure.[5] However, the federal rules that were adopted in 1970 were not identical to the 1967 proposed rules,[6] resulting in textual differences between the Indiana and federal rules, despite the fact that the Indiana Civil Code Study Commission had intended to adopt rules identical to the federal rules.[7]

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[1]107 F.R.D. 678 (N.D. Ind. 1985).

[2]397 F. Supp. 1146 (D.S.C. 1974), *supp. order, reconsid. denied* (1975).

[3]642 F.2d 1285 (D.C. Cir. 1980).

[4]Ind. Civ. Code Study Comm'n, Comments on the Proposed Final Draft of Ind. R. Civ. P., at 1, 125 (1968) [hereinafter Ind. Civ. Code Study Comm'n (1968)]; 2 W. Harvey, Indiana Practice § 26.1, 490, 491 (2d ed. 1987).

[5]*See also* 1967 Proposed Amendments to the Fed. R. Civ. P. Relating to Discovery, 48 F.R.D. 487 (1969).

[6]*Cf.* 43 F.R.D. 211, 224 (1967); 48 F.R.D. 459, 487 (1969); *see also* Advisory Committee's Explanatory Statement Concerning the 1970 Amendments of the Discovery Rules, 48 F.R.D. 487, 497-508 (1969).

[7]Ind. Civ. Code Study Comm'n (1968), *supra* note 4, at 125; 2 W. Harvey, *supra* note 4, at 459-83.

In 1982, the Indiana discovery rules were amended and many of the differences between the federal and Indiana rules were removed.[8] Again, the intent was to make the Indiana rules parallel in function and form to the federal rules.[9] Indiana courts have acknowledged the similarity between the Indiana and federal rules and have often relied on federal authorities in construing the Indiana rules.[10] However, Indiana's courts have also recognized important differences remaining between the Indiana and federal discovery rules.[11] For example, neither federal rule 26(f)[12] nor the 1983 amendments to federal rules 26(b)[13] and 26(g)[14] were adopted by Indiana.

A. Scope of Discovery

The policy of the Indiana Supreme Court is that the scope of Indiana's discovery rules is broader than that of the federal rules.[15] This policy is based, in part, on a recognition of the need to apply the Indiana rules to civil cases such as dissolution of marriage, child custody, support assignments, and the probate of wills—topics that are not litigated in federal courts.[16] In addition, the relevancy test, which determines whether or not information is discoverable, is broadly interpreted under the Indiana rules.[17]

In Indiana, under trial rule 26(B)(1), nonprivileged information that is relevant will be discoverable. Information will be found to be actually relevant "if there is the *possibility* the information sought will be relevant

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[8]IND. CIV. CODE STUDY COMM'N (1982). Some differences remain between the Indiana and federal rules. For example, rules 33 and 36 are still different in the federal and Indiana rules.

[9]*Id.*; *see also* 2 W. HARVEY, *supra* note 4, § 26.1, at 491.

[10]*See, e.g.*, Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1036 (Ind. Ct. App. 1985); Coster v. Coster, 452 N.E.2d 397, 400 (Ind. Ct. App. 1983); Rembold Motors, Inc. v. Bonfield, 155 Ind. App. 422, 439, 293 N.E.2d 210, 220 (1973).

[11]IND. CIV. CODE STUDY COMM'N (1982).

[12]Plummer v. Ulsh, 248 Ind. 462, 463, 229 N.E.2d 799, 800 (1967) (Indiana has an equivalent of FED. R. CIV. P. 26(f)); IND. CIV. CODE STUDY COMM'N (1982).

[13]IND. CIV. CODE STUDY COMM'N (1982); 2 W. HARVEY, *supra* note 4, § 26.1, at 492.

[14]2 W. HARVEY, *supra* note 4, § 26.1, at 492.

[15]Front v. Lane, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982); Costanzi v. Ryan, 175 Ind. App. 257, 265-66, 370 N.E.2d 1333, 1338 (1978); 2 W. HARVEY, *supra* note 4, § 26.1, at 491-92 (discussing findings of the Indiana Supreme Court Committee on Rules of Practice and Procedure); *see also* Chustak v. Northern Ind. Public Serv. Co., 259 Ind. 390, 395, 288 N.E.2d 149, 152-53 (1972).

[16]2 W. HARVEY, *supra* note 4, § 26.1, at 492.

[17]*See Chustak*, 259 Ind. at 395, 288 N.E.2d at 152-53 (distinguishing the breadth of discovery in Indiana from that in federal courts); *see also* Davisson v. Indiana Nat'l Bank, 493 N.E.2d 1311, 1316 (Ind. Ct. App. 1986); Kaufman v. Credithrift Financial, Inc., 465 N.E.2d 207, 210 (Ind. Ct. App. 1984); *Costanzi*, 175 Ind. App. at 271, 370 N.E.2d at 1341.

to the subject matter of the action."[18] Indiana courts have found reversible error when a party has been denied access to potentially relevant information through the discovery process.[19]

Within the spirit of the rules, Indiana trial judges have considerable discretion in defining the scope of discovery.[20] Appellate review of discovery orders is limited to situations where the trial court abused its discretionary powers.[21] "An abuse of discretion is an erroneous conclusion which is clearly against the logic and effect of the facts of the case."[22] However, Indiana's rules do not include the second paragraph of federal rule 26(b)(1) which gives the court power to limit the time for discovery or otherwise curtail discovery where there is undue expense or burden on a party. The intent in Indiana is to promote a full and self-executing discovery process.[23]

B. Privilege as an Exception to the General Rule of Discoverability

Under both the Indiana and federal rules, information that is not privileged and that is relevant is discoverable.[24] There are both absolute and partial privileges. Information that is *absolutely privileged* is not discoverable once the privilege has attached unless the privilege is waived by the holder of the privilege.[25] If the information sought is *partially privileged*, there are circumstances in which the information may or may not be subject to discovery.[26]

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[18]Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1036 (Ind. Ct. App. 1985) (emphasis added).

[19]*See, e.g.*, Indiana & Mich. Elec. Co. v. Pounds, 426 N.E.2d 45 (where information was relevant and there was no discernible basis for denying discovery, the plaintiff was "gravely handicapped" in his search for evidence), *reh'g denied*, 428 N.E.2d 108 (Ind. Ct. App. 1981). *But see* Ellis v. Public Serv. Co. of Ind., Inc., 168 Ind. App. 269, 342 N.E.2d 921 (1976) (no reversible error where a motion to compel answers to interrogatories was denied because the plaintiff had already received similar information through requests for admissions).

[20]Coster v. Coster, 452 N.E.2d 397, 400-01 (Ind. Ct. App. 1983) (*see also* cases cited therein); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1058 (Ind. Ct. App. 1980).

[21]Drexel Burnham Lambert, Inc. v. Merchants Investment Counseling, Inc., 451 N.E.2d 346, 348-49 (Ind. Ct. App. 1983); City of Bloomington v. Chuckney, 165 Ind. App. 177, 183, 331 N.E.2d 780, 784 (1970).

[22]Condon v. Patel, 459 N.E.2d 1205, 1207 (Ind. Ct. App. 1984) (quoting Boles v. Weidner, 449 N.E.2d 288, 290 (Ind. 1983)); *see also* Kaufman v. Credithrift Financial, Inc., 465 N.E.2d 207, 210 (Ind. Ct. App. 1984); THQ Venture v. SW, Inc., 444 N.E.2d 335, 340 (Ind. Ct. App. 1983).

[23]Chrysler v. Reeves, 404 N.E.2d 1147, 1151 (Ind. Ct. App. 1980); 2 W. HARVEY, *supra* note 4, § 26.1, at 491-92 (discussing the findings of the Indiana Supreme Court Committee on Rules of Practice and Procedure).

[24]FED. R. CIV. P. 26(b)(1) & 26(b)(3); IND. R. TR. P. 26(B)(1) & 26(B)(3). For a general discussion of the power to compel discovery, see 8 J. WIGMORE, EVIDENCE §§ 2192, 2195 (3d ed. 1940). *See also* Hickman v. Taylor, 329 U.S. 495 (1946).

[25]2 W. HARVEY, *supra* note 4, § 26.5, at 494.

[26]*Id.* at 496.

Because there is no federal statutory law of privilege,[27] state law, whether of statutory or common law origin, will control questions of privilege in both federal and state courts.[28] In Indiana, the absolute privileges that are recognized are those of the attorney-client,[29] clergy-penitent,[30] husband-wife,[31] and physician-patient.[32] These privileges are codified at Indiana Code section 34-1-14-5. In addition, other absolute privileges recognized in Indiana are those of the accountant-client,[33] news reporter,[34] and governmental agencies.[35]

Under both Indiana and federal rule 26(b)(3), there is a limited or partial privilege for documents and tangible things prepared in anticipation of litigation by a party or a party's agent.[36] These documents or other tangible things will not be protected from discovery where the party seeking disclosure is able to show "substantial need" for the materials, and inability "without undue hardship to obtain the substantial equivalent of the materials by other means."[37] However, the partial

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[27]FED. R. CIV. P. 26(b)(1) refers to privilege as defined in the Federal Rules of Evidence. FED. R. EVID. 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[28]Couch v. United States, 409 U.S. 322, 335 (1972) (there is no federal statutory law of privilege); Collins v. Bair, 256 Ind. 230, 234, 268 N.E.2d 95, 97 (1971) (state law of privilege controls in federal courts).

[29]The attorney-client privilege was recognized in Indiana as early as 1840 in Jenkinson v. State, 5 Blackf. 465, 466-67 (Ind. 1840). Indiana recognizes the attorney-client privilege in case law, by statute (IND. CODE § 34-1-14-5 (1982)), and in its Code of Professional Responsibility. Brown v. State, 448 N.E.2d 10, 14 (Ind. 1983); *see also* Colman v. Heidenreich, 269 Ind. 419, 421-22, 381 N.E.2d 866, 868-69 (1978); Newton v. Yates, 170 Ind. App. 486, 494, 353 N.E.2d 485, 491 (1976), *reh'g denied* (attorney-client privilege in Indiana generally).

[30]*See, e.g.*, Farner v. Farner, 480 N.E.2d 251, 260 (Ind. Ct. App. 1985); Dehler v. State, 22 Ind. App. 383, 390, 53 N.W. 850, 853 (1899).

[31]*See, e.g.*, Solomon v. State, 439 N.E.2d 570, 574 (Ind. 1982); Hunt v. State, 235 Ind. 276, 281, 133 N.E.2d 48, 50 (1956).

[32]*See, e.g.*, Corder v. State, 467 N.E.2d 409, 415 (Ind. 1984); Collins v. Bair, 256 Ind. 230, 236, 268 N.E.2d 95, 97 (1971).

[33]*See, e.g.*, Ernst & Ernst v. Underwriters Nat'l Assurance Co., 178 Ind. App. 77, 81, 381 N.E.2d 897, 899-900 (1978).

[34]Slone v. State, 496 N.E.2d 401, 405 (Ind. 1986) (citing IND. CODE § 25-2-1-23 (1971)).

[35]Avery v. Webb, 480 N.E.2d 281, 282 (Ind. Ct. App. 1985).

[36]FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3).

[37]FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3); *see also* Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

privilege in rule 26(b)(3) does not protect against discovery of the underlying facts contained in the documents or other tangible things through the use of written interrogatories or oral depositions[38] unless an absolute privilege, such as the attorney-client privilege, also applies to the information sought or unless the information can be brought under the scope of the more general common law work product privilege[39] or the mental impressions exception of rule 26.[40]

The privilege for documents and tangible things prepared in anticipation of litigation found in rule 26(b)(3) should be distinguished from the more general work product privilege established in both federal[41] and Indiana case law.[42] Because the rule 26 work product privilege is limited to items prepared in anticipation of litigation, it does not apply to documents or other items prepared in the normal course of business.[43] The common law work product privilege, established in *Hickman v. Taylor*,[44] recognized by Indiana courts,[45] operates beyond the scope of the rule 26 privilege because it is not limited to items prepared in anticipation of litigation[46] and will protect against discovery through interrogatories and depositions, unlike the privilege in rule 26(b)(3), which covers only documents and tangible things.[47]

The protection against discovery of the attorney's mental impressions, conclusions, opinions, or legal theories is also established both in rule 26(b)(3) and in case law.[48] Like the work product privilege, the privilege for an attorney's mental impressions is protected under rule 26(b)(3) when the opinion, conclusion, or impression is found in a document or tangible thing.[49] When the source of the attorney's mental impression is a conclusion drawn or opinion expressed in an answer to a question at a deposition or in a interrogatory, the protection is found in case law, particularly in *Hickman v. Taylor*.[50] It is unclear, however, both

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[38]Upjohn v. United States, 449 U.S. 383, 395 (1981). The distinction between what is a discoverable fact and what is a privileged communication may be cloudy in some cases. *See, e.g.*, Colman v. Heidenreich, 269 Ind. 419, 427, 381 N.E.2d 866 (1978) (question of the discoverability of client identity information).

[39]*Hickman*, 329 U.S. at 508-11; Newton v. Yates, 170 Ind. App. 486, 494-96, 353 N.E.2d 485, 490-91 (1976), *reh'g denied*; *see also* 2 W. HARVEY, *supra* note 4, § 26.8, at 503.

[40]FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3).

[41]*Hickman*, 329 U.S. at 510; *see also* 2 W. HARVEY, *supra* note 4, § 26.3, at 503.

[42]*Newton*, 170 Ind. App. at 493, 353 N.E.2d at 490; *see also* 2 HARVEY, *supra* note 4, § 26.3, at 503.

[43]Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1037-39 (Ind. Ct. App. 1985); *In re* Snyder, 418 N.E.2d 1171, 1177 (Ind. Ct. App. 1981).

[44]329 U.S. at 495.

[45]*See, e.g.*, *Newton*, 170 Ind. App. 486, 353 N.E.2d 485.

[46]2 W. HARVEY, *supra* note 4, § 26.8, at 503.

[47]Upjohn v. United States, 449 U.S. 383, 399-401 (1981); *see also* 2 W. HARVEY, *supra* note 4, § 26.3, at 503.

[48]*Upjohn*, 449 U.S. at 397-401.

[49]*Hickman*, 329 U.S. at 509-10.

[50]*Id.*

in rule 26(b)(3) and in the cases discussing mental impressions, whether the privilege is absolute or subject to invasion upon a proper showing.[51]

C. *Waiver of Privilege*

All sources of privilege rest on policy considerations about the nature of confidential information and our adversary system of justice. In the case of the attorney-client privilege and similar privileges based on confidential relationships, it is the underlying belief in the social value of such relationships upon which the privilege ultimately rests.

> [P]rivileges do not exist in a vacuum. They are enacted to foster some relationship or protect some interest that is believed to be of sufficient social importance to justify the sacrifice of relevant evidence to the fact finding process. In analyzing the nature and scope of any statutorily created privilege, the first step is to determine the specific interest or relationship that the privilege seeks to foster. Only by doing this can a specific claim of privilege be evaluated against the principle that the public is entitled to every person's evidence.[52]

In the case of the attorney-client relationship, the privilege is intended to encourage full and honest communication between the attorney and client in order that the client will seek legal advice early and that the attorney may give informed legal advice, thereby best representing the interests of the client.[53] The attorney-client privilege is an exception to the general rule that courts are entitled to everyone's evidence.[54] The privilege will protect information from disclosure only where the party claiming the privilege can prove all the necessary elements of the privilege. Wigmore identified eight elements needed to establish a claim of attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by

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[51]Upjohn v. United States, 449 U.S. at 401, did not decide the question whether opinion work product is absolutely protected from discovery. The Supreme Court in *Upjohn* noted a split among the circuits on this question. *See In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973) (finding absolute protection for personal notes and recollections of attorney); *cf. In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re* Grand Jury Subpoena, 599 F.2d 504, 511-12 (2d Cir. 1979) (both reaching a different result on the discoverability of attorney's mental impressions and opinion work product). No Indiana courts have given a definitive answer to this question, but see Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1037 (Ind. Ct. App. 1985), on discovery of mental impressions of the attorney under Indiana Trial Rule 26(B)(3).

[52]Ernst & Ernst v. Underwriters Nat'l Assurance Co., 178 Ind. App. 77, 86, 381 N.E.2d 897, 902 (1978).

[53]*See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980); *Upjohn*, 449 U.S. at 389.

[54]*In re* Continental Illinois Securities Litigation, 732 F.2d 1302, 1315 (7th Cir. 1984) (there is no equivalent to the fifth amendment protection against self-incrimination in civil discovery); J. WIGMORE, *supra* note 24, § 2192, at 64.

> the client, (6) are at [the client's] instance permanently protected (7) from disclosure by [the client] or by the legal advisor, (8) except the protection may be waived.[55]

Confidentiality alone is insufficient to establish the attorney-client relationship.[56] Although the United States Supreme Court, in *Upjohn v. United States*,[57] held that the attorney-client privilege includes not only the giving of legal advice to the client, but also the giving of information to the attorney "to enable him to give sound and informed advice," the presence of the attorney-client privilege rests on the subject matter of the communications in the context of legal problem-solving and advice.[58] The essence of the privilege is the confidentiality necessary to obtain legal advice;[59] hence, confidential information, even between attorney and client, is not always privileged.[60]

When attorney-client communications are disclosed to a third party, the confidentiality of the information has been willfully breached and the privilege is waived.[61] There is no need to protect attorney-client communications from discovery by an adversary party where the holder of the privilege has voluntarily disclosed the information outside the bounds of the confidential relationship.

D. Limitations to Waiver of Privilege

Federal circuit courts are split as to whether particular circumstances warrant an extension of the waiver of attorney-client or work product privilege, notwithstanding the client's disclosure of some information in a limited context.[62] Because the premise that all relevant evidence should

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[55]8 J. WIGMORE, *supra* note 24, § 2292, at 558.

[56]*In re* Continental Illinois Securities Litigation, 732 F.2d at 1315 (whether information is damaging to a client is an issue apart from the question of privileges).

[57]449 U.S. 383 (1981).

[58]*Id.* at 394.

[59]United States v. Willis, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983) (establishing a test for legal versus nonlegal advice); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 360 (D. Mass. 1950) (business advice even when given by attorney is not privileged).

[60]8 J. WIGMORE, *supra* note 24, § 2311, at 600.

[61]United States v. AT&T, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980).

[62]Federal cases suggesting that voluntary disclosure of privileged communications to regulatory agencies constitutes waiver include Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *In re* Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979); *see also In re* Sealed Case, 676 F.2d 793, 817-18 (D.C. Cir. 1981) and cases cited therein. *But see* Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977), *rehearing en banc* (dictum) (limited waiver of privilege for voluntary disclosure to the SEC). The Indiana Supreme Court adopted new disciplinary rules in January 1987 dealing with confidentiality and privilege. Rule 1.6 allows the attorney to reveal information to the extent the attorney believes it is reasonably necessary to carry out the representation of the client, to prevent the client from committing a criminal act, and in a controversy between the attorney and client. Such disclosure of client confidences may include sharing of information with other attorneys in a firm. 499 N.E.2d CXII-CXIII. *See also* rule 2.2 where an attorney acts as an intermediary between two clients. 499 N.E.2d CXXXVII.

be heard undergirds our entire judicial system, privileges are construed narrowly.[63] Such strict interpretation has resulted in the application of the doctrine of implied waiver whenever the client has acted in a manner inconsistent with the privilege or contrary to the policy underlying the privilege, regardless of the client's subjective intent not to waive the privilege.[64] Based on public policy considerations for promoting cooperation with investigatory and regulatory agencies of the federal government, some federal courts have recognized a limitation of the waiver of the attorney-client privilege where a client voluntarily discloses confidential information to a governmental agency such as the Internal Revenue Service or the Securities and Exchange Commission.[65]

The doctrine of subject matter waiver, which also stems from a strict interpretation of privilege, states that a client who voluntarily waives the privilege as to some document(s) or some information that the client considers not harmful may not reassert the privilege for other items covering the same subject matter that the client considers damaging.[66] Once a client has breached the privilege, whether through voluntary disclosure or an action inconsistent with the privilege, all communications between the attorney and client on that subject matter become discoverable.[67] The rationale is one of basic fairness, and the rule will be applied even where the client has attempted to limit the waiver of the privilege in some way.[68]

Because the work product privilege is intended to protect the fruits of the attorney's labors in trial preparation, disclosure to a non-party outsider is not necessarily inconsistent with the privilege and will not automatically result in waiver.[69] Where the disclosure is made to further trial preparation, such as consultation with experts or other attorneys, courts generally do not find a waiver.[70] However, where the work product

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[63]8 J. WIGMORE, *supra* note 24, § 2192, at 67.

[64]*Permian*, 665 F.2d at 1221; *In re* Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).

[65]*Diversified Industries*, 572 F.2d at 611; *see also* Chubb Integrated Systems v. National Bank of Wash., 103 F.R.D. 52, 63-64 (D.D.C. 1984) (distinguishing waiver of attorney-client privilege from waiver of work product privilege).

[66]8 J. WIGMORE, *supra* note 24, § 2327, at 631-32.

[67]United States v. AT&T, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980); *see also* cases cited therein.

[68]*In re* Sealed Case, 676 F.2d at 818, 825; *see also* Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651-52 (9th Cir. 1978) (disclosure as a result of judicial compulsion will not result in waiver); *Diversified Industries*, 572 F.2d at 611. *Cf.* United States v. Nobles, 422 U.S. 225, 239 (1975) (testimonial use of privileged information results in waiver of work-product privilege).

[69]Hickman v. Taylor, 329 U.S. 495, 511 (1946). *See generally* 8 J. WIGMORE, *supra* note 24, § 2301, at 584.

[70]*See, e.g.*, United States v. AT&T, 642 F.2d at 1300; GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979) (no waiver unless disclosure is inconsistent with purpose of work product privilege and disclosure "substantially increases the possibility" that an adversary will obtain the information). *But see Chubb Integrated Systems*, 103 F.R.D. at 63 (few courts have considered "the degree of disclosure necessary to constitute a waiver").

is divulged in such a way that an adversary party may become privy to the information, courts have reached the opposite result.[71]

Other exceptions to the waiver of attorney-client or work product privilege revolve around overlapping of interests between those privy to otherwise confidential communications.[72] Most cases in this area have involved exchange of confidential information between co-parties[73] (often referred to as the joint defense exception) or situations where two clients knowingly retain the same attorney and intend to disclose their individual communications to each other, but not to third parties.[74] In the majority of cases dealing with disclosure of confidential information between co-parties, no waiver has been found based on the "commonality of interests" between the parties or the "mutual interests" of related parties in the litigation.[75]

III. Corporate Exceptions to Waiver of Attorney-Client and Work Product Privileges

It is well established in Indiana[76] and federal[77] law that corporations may assert the attorney-client privilege and that their attorneys may assert the work product privilege. The implications of attorney-client privilege in the corporate context have only recently come under judicial scrutiny.[78] "Although attorney-client privilege has ancient origins, its applicability and scope in the context of attorneys representing corporate clients appears to be a relatively recent subject of litigation. The only major Supreme Court decision, in fact, was decided [in 1981]."[79]

As noted earlier, the United States Supreme Court clarified the extent of attorney-client and work product privileges in *Upjohn v. United States*.[80] However, the *Upjohn* decision and numerous subsequent decisions in federal and state courts have acknowledged that many questions about privileged communications in the corporate context remain un-

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[71]*In re* Sealed Case, 676 F.2d at 822-23; *In re* Subpoenas Duces Tecum to Fulbright and Jaworski, 99 F.R.D. 582, 586, *rev. suppl. memo.*, (D.D.C. 1983); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985).

[72]8 J. Wigmore, *supra* note 24, § 2312, at 603-07 (sharing information between parties and adversaries).

[73]*See, e.g.*, Vilastor-Kent Theater Corp. v. Brandt, 19 F.R.D. 522, 524 (S.D.N.Y. 1956).

[74]This is often the case among business partners and makers of mutual wills. *See, e.g.*, Estate of Voelker, 182 Ind. App. 650, 396 N.E.2d 398 (1979).

[75]Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551, 555 (N.D. Ill. 1964); Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578 (S.D.N.Y. 1960).

[76]*See, e.g.*, Newton v. Yates, 170 Ind. App. 486, 494, 353 N.E.2d 485, 490 (1976) (citing Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963)), *reh'g denied.*

[77]*See, e.g.*, Upjohn v. United States, 449 U.S. 383, 390 (1981).

[78]*See In re* John Doe Corp., 675 F.2d 482, 487 (2d Cir. 1982).

[79]*Id.*

[80]449 U.S. at 383.

answered.[81] Among these questions is whether attorney-client or work product privilege is waived when the corporation reveals a confidential communication to a third party, albeit one within the corporate umbrella. A partial answer to this question appeared in *Duplan Corp. v. Deering Milliken, Inc.*,[82] which addressed waiver of privilege when confidential information is exchanged between parent-subsidiary corporations. In 1985, in *Roberts v. Carrier Corp.*,[83] the United States District Court for the Northern District of Indiana addressed waiver of privilege between sister subsidiaries. Although it did not involve inter- or intracorporate communications, *United States v. AT&T*,[84] an earlier federal case, applied a test for waiver similar to that in *Roberts* in situations where confidential information was disclosed by a corporation to a nonparty regulatory agency.

A. Roberts v. Carrier Corp.

Roberts v. Carrier Corp.[85] involved an ancillary proceeding on a motion to compel discovery under Federal Rule of Civil Procedure 37(a), which governs the deposition of a nonparty witness. The underlying lawsuit is currently pending in the United States District Court for the Eastern District of Texas.[86] The primary dispute is a personal injury action involving a question of products liability for a component valve, manufactured by Hamilton Standard Controls and used in a gas furnace which was, in turn, manufactured and marketed by Carrier Corp. Both Carrier and Hamilton are part of the Essex Group, Inc., and are wholly-owned subsidiaries of United Technologies, Inc. Only Carrier is a party-defendant in the Texas district court action.[87]

Plaintiff Roberts' discovery motions contained a request for the production of documents, including "[a]ll communications and/or agreements between Carrier Corporation and Hamilton Standard Controls, Inc. concerning this lawsuit, whether written or not."[88] Hamilton and Carrier objected to this discovery request on the basis of attorney-client and work product privileges.[89]

Consequently, Hamilton filed a motion to quash the discovery request, based on a claim of attorney-client and work product privileges, in the district court for the Northern District of Indiana, the place where the deposition was to take place.[90] Before reaching the merits of the attorney-client privilege defense, the Indiana district court determined

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[81] *See, e.g., In re* John Doe Corp., 675 F.2d at 487-88.
[82] 397 F. Supp. 1146 (D.S.C. 1974) *supp. order, reconsid. denied* (1975).
[83] 107 F.R.D. 678 (N.D. Ind. 1985).
[84] 642 F.2d 1285 (D.C. Cir. 1980).
[85] 107 F.R.D. 678.
[86] *Id.* at 681.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

that *privilege*, as used in Federal Rule of Civil Procedure 26(b)(1), is defined by the Federal Rules of Evidence, specifically Federal Rule of Evidence 501.[91] Under Federal Rule of Evidence 501, the forum state's law of privilege controls in a diversity action such as this.[92] In the Seventh Circuit, the forum state is the state where the district court sits;[93] therefore, the district court applied the Indiana law of privilege.[94]

Hamilton and Carrier argued that attorney-client privilege protected the documents requested because they originated from communications between Carrier and its attorneys and between Carrier and its insurer.[95] Roberts contended that any privilege had been waived when Carrier shared confidential documents with Hamilton.[96] The Indiana district court noted that Indiana state courts recognize waiver of privilege when confidential communications are divulged to a third party,[97] but found that a narrower question—whether waiver occurs when the third party is a sister corporation of the claimant of attorney-client privilege—was one of first impression for Indiana courts.[98] In applying what it believed Indiana law would be, the federal court held that no waiver should be found.[99] It based its conclusion on a three-part analysis.

First, the court distinguished other Indiana cases where waiver of the attorney-client privilege was found by noting these cases "involved third parties with clearly divergent interests from that of the client."[100] For example, in *Webster v. State*,[101] the Indiana Supreme Court found no privilege for communications between the prosecutor and the attorney of the brother of a criminal defendant regarding leniency for the brother if he testified against the defendant because the attorney and the prosecutor were in adversarial positions and had no common interests. In *Model Clothing House v. Hirsch*,[102] the Indiana Court of Appeals found communications from an employer to the attorney of an employee were

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[91]*Id.* at 685-86 (citing United States v. Reynolds, 345 U.S. 1, 6 (1953); Sirmans v. City of So. Miami, 86 F.R.D. 492 (S.D. Fla. 1980)).

[92]107 F.R.D. at 685 (citing Sommer v. Johnson, 704 F.2d 1473, 1478 (11th Cir. 1983); Miller v. TransAmerican Press, Inc., 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Samuelson v. Susen, 576 F.2d 546, 549 (3d Cir. 1978); Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.), Inc., 97 F.R.D. 37, 39 (E.D.N.Y. 1983)).

[93]Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir.), *cert. denied*, 351 U.S. 965 (1955); *see also Samuelson*, 576 F.2d at 549; 2 W. HARVEY, *supra* note 4, § 26.7, at 497-98.

[94]*Roberts*, 107 F.R.D. at 686-87 (citing Brown v. State, 448 N.E.2d 10 (Ind. 1983); Key v. State, 235 Ind. 172, 132 N.E.2d 143 (1956); Bruce v. Osgood, 113 Ind. 360, 14 N.E. 563 (1887); Model Clothing House v. Hirsch, 42 Ind. App. 270, 85 N.E. 719 (1908); Webster v. State, 261 Ind. 309, 302 N.E.2d 763 (1973)).

[95]*Id.* at 686.

[96]*Id.*

[97]*Id.* at 687.

[98]*Id.*

[99]*Id.* at 688.

[100]*Id.* at 687.

[101]261 Ind. 309, 302 N.E.2d 763 (1973).

[102]42 Ind. App. 270, 85 N.E. 719 (1908).

not confidential because of the different interests represented by the employer and the employee and the fact that the employer did not intend the communication to be confidential.

Second, the *Roberts* court looked at the nature of the corporate structure and the subsidiary relationship between Hamilton and Carrier. Noting that the attorney-client privilege applies to corporate clients,[103] the court looked to *Duplan Corp. v. Deering Milliken, Inc.*,[104] as supporting the extension of nonwaiver doctrines beyond intracorporate and parent-subsidiary communications to communications between sister subsidiary corporations.

The *Duplan* litigation centered on confidential attorney-client communications among a number of corporate subsidiaries and between a patent owner and the manufacturer/licensees.[105] The *Duplan* court found no waiver of the attorney-client privilege where the corporations sharing confidential communications have sufficient community of legal interests.[106] Because the underlying objective of the attorney-client privilege is "to secure objective freedom of mind for the *client* in seeking legal advice . . .,"[107] the *Duplan* court decided that the key considerations were that the interests be legal and be identical.[108]

> Thus, where there is no legal interest (duty or direct transaction between the two clients of the attorney), the mere interest of a non-party client in legal transactions between the prime client and an outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally effected by the outcome of the transaction between the prime client and an outsider.[109]

The *Duplan* court emphasized that it was the *legal* interest among the corporations, and not their business structure or commercial interests alone, that led it to hold that communications remain protected by the attorney-client privilege even though shared between parent and subsidiary corporations.[110] In particular, the *Duplan* court stated:

> Although an interest of a third-party corporation from a commercial standpoint would not establish a sufficient community

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[103]*Roberts*, 107 F.R.D. at 687.

[104]397 F. Supp. 1146, 1184-85 (D.S.C. 1974), *supp. order, reconsid. denied* (1975).

[105]*Id.* at 1175-77.

[106]*Id.* at 1175.

[107]*Id.* at 1175 (quoting 8 J. WIGMORE, *supra* note 24, § 2317, at 615-16) (emphasis in original).

[108]*Id.* at 1185.

[109]*Id.* at 1175.

[110]*Id.* at 1184. (In Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985), an overlapping of commercial and legal interests, where the relationship was more adversarial than co-operative, was held to be a basis for precluding plaintiffs from using the *Duplan* exception as a means of resisting discovery.)

> of interest, the fact that the communications are among formally different corporate entities which are under common ownership or control leads this court to treat such interrelated-corporate communications in the same manner as intra-corporate communications.[111]

Thus, corporate relationship is necessary, but not sufficient in itself, to establish the preservation of the privilege. However, citing *United States v. United Shoe Machinery Corp.*,[112] the *Duplan* court opined that "[i]f the communication were relayed to an unrelated third party corporation, the privilege would be waived."[113]

In applying the *Duplan* test to the *Roberts* case, the Indiana district court held there was identity of legal interest between Hamilton and Carrier sufficient to bar any waiver of the attorney-client privilege even though confidential communications had been passed between the two corporations.[114] This identity existed despite the fact that Hamilton was not a party in the underlying litigation because Hamilton had a "significant interest" in the litigation, especially in terms of other pending or potential litigation involving the gas furnace valve.[115] "[T]he identity of interest arises out of the valve itself and the defense of the claim involving it."[116]

While the *Roberts* court paralleled the *Duplan* analysis by focusing on the mutuality of interest between corporate entities and the specific legal nature of their interest, it altered the *Duplan* analysis by adding a third element, the identity of the gas furnace valve itself.[117] The identity of the exact transaction or factual basis for the litigation seems to narrow the application of the *Duplan* exception to the waiver doctrine. By requiring identity of the gas valve itself *and* identity of legal interests between the two corporations vis-a-vis their relationship to the valve, specifically the defense of products liability claims involving the valve, the *Roberts* decision both expands and contracts the *Duplan* exception.

In the third part of its analysis, the *Roberts* court went on to discuss the work product privilege under Federal Rule of Civil Procedure 26(b)(3) as it related to communications between Carrier and Hamilton "regarding this lawsuit."[118] Because the documents requested by Roberts were clearly prepared in anticipation of litigation, there is no doubt that the work product privilege applied.[119] The court concluded summarily that Roberts had not made a showing sufficient under rule 26(b)(3) to warrant dis-

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[111]397 F. Supp. at 1184.
[112]89 F. Supp. 357, 359 (D. Mass. 1950).
[113]397 F. Supp. at 1185.
[114]107 F.R.D. at 688.
[115]*Id.*
[116]*Id.*
[117]*Id.*
[118]*Id.* at 688-89.
[119]Hickman v. Taylor, 329 U.S. 495, 510 (1946).

covery.[120] Because waiver of the attorney-client privilege is more strictly construed and therefore subsumes waiver of the work product privilege based on the policy rationales for these privileges, the court denied production of the documents requested by Roberts on the independent grounds of both attorney-client privilege and work product privilege.[121]

B. AT&T v. United States

Commonality of legal interests and identity of the underlying transaction leading to litigation were factors recognized by the District of Columbia Circuit Court of Appeals, which, in *United States v. AT&T*,[122] held there was no waiver of the work product privilege when unrelated entities exchanged confidential trial preparation materials. The *AT&T* case, like *Roberts*, was an ancillary proceeding to compel discovery.[123] The primary dispute in the case involved two separate antitrust actions against AT&T brought by MCI Communications, Inc.,[124] and the United States Department of Justice.[125]

In the interest of judicial economy and efficiency, the United States District Court for the Northern District of Illinois allowed MCI to share with the Department of Justice discovery materials which MCI had obtained from AT&T and other documents MCI had prepared in anticipation of its private antitrust action against AT&T.[126] MCI shared with the government its copies of thousands of pages of documents obtained from AT&T and its explanations of those documents. In addition, MCI had developed a computerized litigation support system which included in its database explanatory and analytical materials pertaining to the AT&T documents.[127] While allowing the government to obtain these items from MCI, the Illinois court ordered that the documents remain confidential.[128]

AT&T then moved against the Department of Justice in the United States District Court for the District of Columbia to compel discovery of the database and explanatory materials which the government had received from MCI on the basis that the work product privilege for the documents had been waived by MCI when it gave the materials to the government.[129] The District of Columbia court held that the work product privilege had been waived and granted AT&T's motion.[130] The court of

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[120]107 F.R.D. at 689.

[121]*Id.*

[122]642 F.2d 1285 (D.C. Cir. 1980).

[123]*Id.* at 1288.

[124]MCI Communications Corp. v. AT&T, 462 F. Supp. 1072, 1077 (N.D. Ill.), *aff'd*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

[125]United States v. AT&T, 461 F. Supp. 1314, 1317 (D.D.C. 1978).

[126]*AT&T*, 642 F.2d at 1289.

[127]*Id.*

[128]*Id.*

[129]*Id.*

[130]*Id.*

appeals for the District of Columbia reversed the lower court and held that the work product privilege would preclude discovery by AT&T.[131]

Generally, the court of appeals focused on the existence of common interests between the transferor and transferee of the work product information, concluding that this commonality was relevant to a determination of whether the disclosure was consistent with the privilege.[132] In addition, the appellate court noted that "where the disclosure is made under a guarantee of confidentiality, the case against waiver is even stronger."[133]

Specifically, the *AT&T* court based its holding on four considerations: (1) the same transaction was the subject of the litigation in both the private antitrust action brought by MCI and in the public action brought by the Department of Justice; (2) MCI and the government stood in the same position as adversaries of AT&T; (3) the information exchanged between MCI and the government could be characterized as trial tactics and strategy, the "essence" of work product; and (4) the exchange did not involve any evidentiary materials, but only things generated by attorneys.[134]

The ultimate objects of AT&T's discovery motion were documents that AT&T had given to MCI in response to MCI's discovery request in the private antitrust action. AT&T was seeking to "rediscover" its own documents, albeit in the form of work product as they had been reorganized and analyzed by MCI.[135] Thus, AT&T was not seeking attorney-client information like the intercorporate communications about the gas valve sought by Roberts. The distinction between work product and attorney-client communications was noted by the *AT&T* court as underlying its holding.[136]

Another important aspect of the *AT&T* decision was the fact that MCI and the Department of Justice became co-parties. MCI's intervention in the proceeding was held to be a matter of right.[137] This is in contrast with the situation in *Roberts*, where at no point in the proceedings were Hamilton and Carrier Corp. co-parties. Clearly, co-party status bolsters any assertion of commonality or identity of legal interests.

The *AT&T* court's analysis of the long-term effects and benefits of permitting the exchange is even more telling. The court analogized the information sharing between MCI and the government to "giving expert

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[131] *Id.* at 1301.

[132] *Id.* at 1300.

[133] *Id.* at 1299-1300. The court specifically rejected the holding in GAF v. Eastman Kodak, 85 F.R.D. 46 (S.D.N.Y. 1979), a more narrow application of the waiver rule.

[134] *AT&T*, 642 F.2d at 1299-1300.

[135] *Id.*

[136] *Id.* at 1300.

[137] *Id.* at 1296; *see also* discussion of the intervention issue, *id.* at 1291-95. The court held that MCI could intervene in this action as a matter of right under federal rule 24. The presence of MCI was then noted by the court as being a significant factor in allowing assertion of the work product privilege. *Id.* at 1297.

advice'' and distinguished it from the informant situation where evidence must be disclosed to an adversary.[138] The court noted that protecting the work product privilege for MCI's materials against discovery by AT&T would strengthen trial preparation and promote vigorous advocacy on the part of AT&T.[139] Further, the court suggested its holding would encourage future cooperation with the government on the part of private litigants such as MCI.[140]

In the end, the *AT&T* decision rested on dual policy grounds of encouraging cooperation with governmental agencies and promoting the adversarial system. Trial preparation and advocacy are encouraged because the adversary party will be encouraged to seek its own experts and perform its own database analysis. No unfair prejudice results to the adversary because no underlying communications of an evidentiary nature are being protected, only the work product of an advocate. The *AT&T* decision is consistent with prior case law on work product privilege and co-party litigation.[141] Despite the narrower connotation of the *Roberts* court's ''identical'' interest test as compared to the *AT&T* court's ''common'' interest test, the *Roberts* exception is more significant because it extends to non-parties and applies to both the attorney-client and work product privileges.

C. Identity of Legal Interests Exception for Related Corporations

Identity of legal interests as a basis for allowing exchange of confidential communications without effecting a waiver of either attorney-client or work product privilege has significance for corporations in both the legal planning and litigation contexts. The presence of this exception will allow for greater exchange of information between related corporations and will foreclose discovery by an opponent on the basis of the exchange.

While application of the identity of legal interests exception to communications shared between parent and subsidiary corporations and between sister subsidiary corporations is established in the *Duplan*[142] and *Roberts*[143] cases, some questions regarding the scope and application of the exception to attorney-client and work product privileges remain unresolved. For example, questions remain regarding the applicability of the identity of legal interests exception to waiver in noncorporate business settings. The effect on subsidiaries that are not wholly-owned and on unincorporated business structures, such as partnerships and joint ventures, is also unclear.

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[138]*Id.* at 1301.
[139]*Id.* at 1300-01.
[140]*Id.*
[141]*See supra* notes 69-74 and accompanying text.
[142]397 F. Supp. at 1146.
[143]107 F.R.D. at 678.

At least three factors appear to be relevant to application of the waiver exception based on identity of legal interests between related corporations: (1) status of the corporations as parties in the litigation; (2) nature of the legal interest or presence of a legal duty between the corporations; and (3) identity of the underlying event, transaction, or object that forms the basis of the claim or defense.

The *Duplan* holding encompassed both parties and non-parties to both pending and anticipated litigation.[144] The *AT&T* case began with independent litigants who became co-parties in order to assert the work product privilege against a common adversary.[145] The *Roberts* case dealt only with a non-party, but acknowledged the possibility of future litigation involving the non-party.[146] Yet, all three decisions point to the actual or potential co-party status of the entities that were privy to confidential communications.

The question remains whether a court, confronted with a case involving exchange of information among related corporations, either parent-subsidiary or sister subsidiaries, would allow the exchanged communications to remain sheltered within the attorney-client privilege where litigation is neither pending nor anticipated at the time of the exchange. Obviously not all legal advice involves litigation or even potential litigation. Corporations today are faced with many regulatory and reporting requirements which could also involve confidential communications, yet do not entail status as a party to litigation. Based on the holding of the *Roberts* court, potential party status may be a sufficient basis for raising the exception to waiver of privilege when related corporations exchange confidential communications.

A second consideration for determining application of the exception is the presence of a legal duty owed by one corporation to the other. Both *Duplan* and *Roberts* required that the interest shared between the two corporations be based on a legal duty or transaction.[147] Shared commercial, business, or nonlegal interests will not be sufficient to raise the exception.[148] Where both parties to the communication are involved in the same transaction, such as a contract or joint venture, this requirement will not be problematic. However, in some cases involving a question of identity of a legal duty, a court may be put in the awkward position of having to make a determination that goes to the merits of the case—for example, presence of a duty to defend or issues of proximate cause—in order to rule on a pretrial discovery motion. Not only does this inversion run counter to the intent and purpose of modern discovery rules, but it will result in burdensome hearings and ancillary proceedings. A court's ability to rule on the waiver issue will be more difficult where

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[144]397 F. Supp. at 1146.
[145]642 F.2d at 1285.
[146]107 F.R.D. at 687.
[147]397 F. Supp. at 1190; 107 F.R.D. at 687.
[148]*Duplan*, 397 F. Supp. at 1185.

the identity of legal interest was not apparent at the time the confidential information was exchanged between the corporations. For example, where two corporations share attorney-client communications in a business planning context, the legal interests which might later become the subject of a suit against one of the corporations may not be immediately apparent.

The uncertainty of what constitutes an identical legal interest or duty sufficient to bar waiver of attorney-client or work product privilege may also create difficulties for corporate counsel as they attempt to anticipate the effect of sharing information on later discovery motions. The *AT&T* test for *common* interest is more flexible and easier to apply in the corporate setting.[149] Not only is a common interest more easy to demonstrate than identical interest, but there is no restriction in *AT&T* that the interest be legal, although the court of appeals based its discussion of common interests between MCI and the government entirely on the similarity of their positions as adversaries against a common opponent.[150] The fact that MCI and the government could never be co-parties in a single antitrust suit means that their legal positions, while similar, could never be identical.

None of these decisions indicates the effect on waiver of privilege where the legal interests of the parties shift over time. The *Roberts* and *Duplan* requirement of *identical* legal interests places an additional burden on corporate counsel where it is likely the legal interests of those privy to a confidential communication may not be the same at the time the disclosure occurs and by the time a motion for discovery is made. If parties do not have identical legal interests at the time of disclosure, earlier case law on waiver of privilege would seem to indicate no privilege attaches.[151] However, if those corporations that share confidential information later become co-parties in a legal action, perhaps the identity of interest exception applies.

The third element of the exception, identity of the object or transaction that is the subject of the underlying litigation, is unique to the *Roberts* holding. Although the *Duplan* litigation involved questions of patent and licensing rights, the court did not identify them as essential to its holding.[152] The *AT&T* court noted certain similarities of the public and private antitrust actions brought by the Department of Justice and MCI, but did not base its holding on a common event or transaction.[153] Both the requirement of identity of legal interest and identity of the object or event underlying the litigation make the *Roberts* bar to waiver of privilege a narrow exception.

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[149]642 F.2d at 1285-1300.

[150]*Id.* at 1299.

[151]*See, e.g.*, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

[152]397 F. Supp. at 1185.

[153]642 F.2d at 1300.

D. Mixed Business and Legal Communications

Inasmuch as the *Duplan*, *AT&T*, and *Roberts* courts were all dealing primarily with work product materials, the distinction between legal and business communications was not as sharply drawn as it might be in a case dealing exclusively with attorney-client communications. Courts have not hesitated to find waiver of the attorney-client privilege where attorneys did not act in a legal capacity.[154]

The *Roberts* decision eases disclosure problems for corporations once the attorney-client privilege has attached, but it does not change the prerequisites for the existence of the privilege. Before the question of waiver is reached, the proponent of the privilege must establish there was a confidential attorney-client communication dealing with the procurement of legal advice or service.[155] Courts do recognize that in the course of daily business, corporate communications may pass through the hands of mailroom employees, file clerks, secretaries, and other individuals without necessarily breaching confidentiality.[156]

Courts are not so lenient, however, where communications for which the attorney-client privilege is asserted have been shared with auditors, or marketing or financial officers. Where documents prepared by attorneys are used for preparing financial statements and audits,[157] preparing Securities and Exchange Commission compliance documents,[158] and in other nonlegal contexts,[159] the attorney-client privilege may not attach to the documents, making questions of waiver moot. A more difficult question involves preparation of documents that have mixed legal and business purposes, such as in the context of tax planning and common stock offerings. Given the split among the circuits regarding the effect of sharing privileged information with governmental agencies,[160] corporations are well-advised to move cautiously where documents covered by attorney-client privilege are shared with outsiders and used for purposes other than trial preparation or procurement of expert advice.

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[154]*See, e.g.*, SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 683 (D.D.C. 1981) (attorney not acting in legal capacity); United States v. United Shoe Machinery Corp., 89 F. Supp. at 360-61 (business advice is not privileged).

[155]8 J. WIGMORE, *supra* note 24, § 2292, at 558, § 2296, at 569. The party asserting a privilege has the burden of showing that all necessary elements, including absence of waiver, are present.

[156]*See, e.g.*, James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142 (D. Del. 1982).

[157]*In re* John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982).

[158]United States v. Gulf Oil Corp., 760 F.2d 292, 297 (Temp. Emer. Ct. App. 1985).

[159]Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 328 (N.D. Cal. 1985) (where the purpose of the communication is not clear, privilege may not attach). *But see In re* Grand Jury Subpoena Duces Tecum Dated March 24, 1983, 566 F. Supp. 883, 884 (S.D.N.Y. 1983) (there is no authority for the proposition that a document loses its privileged character because the owner of the privilege relies on it in making a statement in *another* document) (emphasis in original). The Supreme Court skirted this issue in the *Upjohn* decision, 449 U.S. at 387.

[160]*See supra* note 62 and accompanying text.

E. Procedural Effects of the Identity of Interests Exception

Allowing related corporations to share confidential communications without waiving their ability to claim attorney-client or work product privilege for the communications will have procedural implications for both corporations and their adversaries. Not only is the exception to waiver of privilege an issue for both the proponent[161] and the opponent of a discovery motion,[162] but there are implications for notice, service of process, amendment of pleadings, and joinder of parties as well.

There is precedent in Indiana that supports an argument that a related corporation that shared confidential information with a corporate party to an action may be charged with notice of the action for purposes of the statute of limitations and amendment of complaints.[163] The closeness of the relationship between two corporations, which is a factor in establishing identity of their legal interests under the *Roberts* and *Duplan* analyses, may also be a basis for finding that there was substituted service of process on the related corporation.[164] The United States Supreme Court has held that a mere parent-subsidiary relationship is insufficient for proving substituted service of process;[165] however, Indiana courts may use estoppel and other equitable principles "to support substance over form, facts over 'procedural complexity' where justice deserves."[166] Where a sister corporation is included in attorney-client communications or privy to materials prepared in anticipation of litigation and where the other tests for finding no waiver of privilege have been met, justice and fairness may lead a court to estop the corporation from claiming insufficient service of process.[167] A corporation may want to

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[161]8 J. WIGMORE, *supra* note 24, § 2292, at 558. The proponent corporation will have an evidentiary and persuasive burden to establish the presence of a privilege, absence of waiver, and/or presence of an exception. These determinations will be questions of fact for the judge. *Id.*, § 2322, at 627; *see also* N.L.R.B. v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965); *Duplan*, 397 F. Supp. at 1159-61.

[162]Where a claim of privilege has been asserted, the party attempting to compel discovery will try to glean as much information about the privileged materials as possible, even where the content of the documents is shielded. Most adversaries will ask for identifying information, such as who were the parties or communicants involved, the capacity in which the individuals were acting at the time of the communication, the subject matter or purpose of the communication or document, and what other individuals were present or privy to the communication or document. While all of these items will have a direct bearing on whether or not an exception to waiver of privilege is found, the relationship among the parties to the communication, their roles and responsibilities regarding the communication and its subject matter, and the individuals or entities to which disclosure has been made will be of particular importance.

[163]Front v. Lane, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982); General Finance Corp. v. Skinner, 426 N.E.2d 77, 82-84 (Ind. Ct. App. 1981).

[164]*General Finance Corp.*, 426 N.E.2d at 84.

[165]Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

[166]*General Finance Corp.*, 426 N.E.2d at 84.

[167]*See* Front v. Lane, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982) (where a party had actual notice of a deposition, no error even though the requirements of trial rule 30 had not been met).

weigh the benefits expected from sharing of confidential information with the jurisdictional and procedural risks, whether the corporation is the giver or receiver of the privileged information.

Similarly, where a related corporation is later joined in an action as party, both Indiana and Federal Rules 15(C) permit an amendment adding a party to relate back to the original date of service of process for the purpose of tolling the statute of limitations.[168] Where no prejudice has occurred and the new party should have known of the original action, the amendment will relate back to the original complaint.[169] It is unlikely that a corporation that has been privy to work product materials of its parent or sister subsidiary would be able to claim prejudice in opposition to a rule 15 motion to amend. Where a corporation that was a party to an action shared privileged communications with a related corporation that was not a party, such as the case with Hamilton and Carrier in the *Roberts* case, the non-party corporation may be estopped from raising a motion under rule 15(C) to preclude joinder even as a party-defendant.[170]

When confidential communications are exchanged between parent-subsidiary or between sister subsidiary corporations, issues of jurisdiction, notice, service of process, and joinder of parties should be considered as potential risks for the corporation that seeks to avoid becoming a party to the action. The adversary party may consider the exchange of confidential communications to be within the parameters of the identity of interest exception as a bar to discovery, but may also find the exchange of privileged communications to be evidence of a sufficient community or identity of interests and evidence that actual notice of the action was received by the non-party corporation such that issues of joinder, jurisdiction, and service of process are moot.

IV. Conclusion

The comparison of the various tests for the related corporation exception to waiver of privilege begins and ends with the policy rationales for the attorney-client and work product privileges. Whereas the work product privilege does not depend on confidentiality per se for its justification, but only on preventing disclosures that are inconsistent with a strong adversary system, both the common interests test in *AT&T* and the identity of legal interests tests in *Duplan* and *Roberts* are logical and practical bases for permitting complex corporate structures to share information among various entities.

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[168]Honda Motor Co., Ltd. v. Parks, 485 N.E.2d 644, 651 (Ind. Ct. App. 1985), *reh'g denied*, (1986); Ryser v. Gatchel, 151 Ind. App. 62, 69, 278 N.E.2d 320, 324 (1972) (Indiana Trial Rule 15(C) cannot be used to bring in a new party-defendant after the statute of limitations has run).

[169]Ind. R. Tr. P. 15(C).

[170]*Honda Motor Co.*, 485 N.E.2d at 647.

The identity of legal interests required by *Duplan* and *Roberts* for attorney-client information is more difficult to establish but fully supports the confidentiality and legal advice purposes of the attorney-client privilege. These exceptions give flexibility to the modern corporation in conducting its business and legal affairs while supporting the judicial and social purposes for allowing privileged communications under modern discovery rules.

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SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER

Barbara Arnold Harcourt Business Editor

PS Form 3526, July 1984

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